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—*Amendment of Part 76*
Docket No. 21006

In view of the interim effectiveness of uniform frequency offsets and of quarterly leakage monitoring requirements, the FCC decided to delay the implementation of the cumulative signal leakage requirements for a period of five years. Quarterly monitoring requirements do not require close-proximity inspection of every linear mile of cable in the system on a quarterly basis. Rather, cable service personnel can make spot checks throughout the entire system while on service calls or while performing installations.

—*Amendment of Part 76*
Docket No. 21006

The FCC generally denied seven petitions for reconsideration of its decision implementing new rules to prevent cable television systems from interfering with aeronautical frequencies. Cable systems may operate on frequencies allocated for aeronautical radio if they meet frequency offset, monitoring and cumulative signal leakage requirements.

—*Amendment of Part 76*
Docket No. 21006

Aeronautical Service

(See also: Aeronautical Radio Navigation Service-*Amendment of Part 76*)

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sions without prior permission of message originator; and 4) eliminate requirements for FCC rebroadcast permission and notification.
—*Amendment of Parts 73/97*
BC Docket No. 79-47

AM Station, Class II Secondary
Special procedures established for nighttime use of Bahamian, Canadian and Mexican AM clear channels; licenses of existing daytime stations on these channels modified to specify nighttime operation; provision made for new fulltime stations and power increases at night; city coverage requirement not applicable at night; application acceptance criteria of §73.37 waived.
—*AM Clear Channels*
MM Docket No. 84-281

Comparative Hearing
Review Board reversed *ID* and found applicant financially and technically disqualified. It never had reasonable assurance of a purported bank loan, only a letter of accommodation. It never had reasonable assurance of a transmitter site, but only *assumed* a lease could be had. Its belated amendment rejected. Grant made to competing applicant.
—*Dutchess Communications Corp.*
BC Docket No. 82-442

(See also: Community Qualifications-*Mighty-Mac B/cing. Company*)

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—*International Communications Assn.*

Cut-Off Rules

ITFS will use traditional "A/B" cut-off lists to establish deadlines for competing applications and petitions to deny. This procedure is more appropriate than a "window" cut-off procedure, given the nature of the applicants and the nature of the service. The "A" cut-off list will provide 60 days to file mutually exclusive applications, major amendments, and petitions to deny. A subsequent "B" list will provide 30 days for petitions to deny and minor amendments.

—*Amendment of Part 74*
MM Docket No. 83-523

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(See: AM Station, Class II Secondary-*AM Clear Channels*)

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—*N. American Telecommunications Assn.*

(See also: Customer Premises Equipment-*International Communications Assn.*)

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(See: Comparative Hearing-*Dutchess Communications Corp.*)

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—*Cannon Communications Corporation*
MM Docket No. 83-976

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—*Amendment of Part 74*
MM Docket No. 83-523

Enhanced Services
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Equipment, Industrial, Scientific, and Medical
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—*Spread Spectrum Systems*
GEN. Docket No. 81-413

Equipment Type Acceptance and Approval
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—*Mobile Communications Services*
GEN. Docket No. 85-171

Facility, Modification
(See: AM Station, Class II Secondary-*AM Clear Channels*)

Financial Qualifications
Notice of Proposed Rulemaking adopted proposing rules to clarify requisite financial qualifications for domestic satellite licensees and requisite transponder fill for existing licensees seeking expansion satellites.
—*Domestic Fixed-Satellite Service*
CC Docket No. 85-135

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—*Offshore Radio Service*
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MM Docket No. 83-1332

Frequency Management
(See: Equipment, Industrial, Scientific, and Medical-*Spread Spectrum System*)

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(See: Aeronautical Radio Navigation Service-*Amendment of Part 76*)

Instructional Television Fixed Service

The Commission will employ a point accumulation method with random selection between equally qualified applicants for choosing among mutually exclusive applications. The most points will be awarded for local applicants and for applicants which are accredited. Points will also be awarded for applicants which comply with the 4-channel limitation, which serve new categories of students, and which are E or F channel group licensees which can demonstrate a need for expansion.

—*Amendment of Part 74*
MM Docket No. 83-523

Only local entities will be considered for ITFS licenses until October 1, 1987. All licensees must be accredited or must serve accredited schools. All licensees not serving their own inschool needs must have the support of their proposed receive sites evidenced by letters demonstrating intended use of the service. Nonlocal licensees will also be required to establish local program selection committees.

—*Amendment of Part 74*
MM Docket No. 83-523

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(See: Instructional Television Fixed Service-*Amendment of Part 74*)

Mutual Exclusivity

(See: Instructional Television Fixed Service-*Amendment of Part 74*)

Notice of Inquiry

(See: Equipment Type Acceptance and Approval-*Mobile Communications Services*)

Offshore Radio Telecommunications Service

(See: Frequency Allocation-*Offshore Radio Service*)

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MM Docket No. 83-858

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AM Station, Class II Secondary
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Facility, Modification

Special procedures established for nighttime use of Bahamian, Canadian and Mexican AM clear channels; licenses of existing daytime stations on these channels modified to specify nighttime operation; provision made for new fulltime stations and power increases at night; city coverage requirement not applicable at night; application acceptance criteria of § 73.37 waived.

—AM Clear Channels
MM Docket No. 84-281

FCC 85-224

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Nighttime Operations on Canadian, Mexican, and Bahamian AM Clear Channels	MM Docket No. 84-281

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 26, 1985; Released: May 7, 1985

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

Background

1. The Commission has before it the comments and reply comments[1] filed in response to the March 15, 1984, *Notice of Proposed Rule Making* in this proceeding (49 Fed. Reg. 18567, published May 1, 1984) proposing to permit additional nighttime operations on channels designated as

[1] A total of 34 parties submitted comments, and four parties submitted reply comments. These parties are listed in Appendix B.

Canadian, Mexican, and Bahamian Class I-A Clear Channels.[2]

2. As the subject *Notice* indicated, international agreements have imposed restrictions on the nighttime use of these 14 channels in the United States. Thus, under the North American Regional Broadcasting Agreement ("NARBA"), the Canadian Clear Channels could not be used at night anywhere within 650 miles of the border with Canada, and the Bahamian Clear Channel could not be used within 650 miles of any point in the Bahamas. The 1968 Bilateral AM Agreement with Mexico is even more restrictive. It precludes nighttime use of the Mexican Clear Channels anywhere in the United States. This situation was expected to change as a result of new international agreements which had been or were being negotiated. Unlike these older agreements, the new agreements were not expected to contain such restrictions.

3. The United States and Canada have signed a new bilateral AM agreement which has replaced NARBA insofar as their mutual dealings are concerned. Under this new agreement, there is no prohibition on the establishment of nighttime operations in the border area on what had been clear channels. Likewise, there is no such restriction in the Final Acts of the Region 2 Administrative Conference (Rio de Janeiro, 1981) to which the Commonwealth of the Bahamas is a signatory. As soon as the Bahamas has implemented its intention to denounce NARBA and to be bound by the Rio Agreement, the same situation will obtain in regard to the Bahamian Clear Channel. In subsequent bilateral discussions with the U.S., the Bahamas has confirmed this intention to take the necessary steps in this regard. Finally, considerable progress has been made in negotiations with Mexico in the development of a new AM agreement which, among other things, is expected to permit new nighttime operations throughout the United States on the seven affected channels.

4. With the above developments in mind, the Commission issued the *Notice* to obtain comments on the standards to be used in establishing nighttime operations on these channels. Specific reference was made to the criteria adopted by the Commission in its 1980 Clear Channel decision.[3] In that proceeding the Commission made it possible for additional Class II stations to be established on the 25 U.S. I-A Clear Channels and set forth the technical and eligibility rules governing applications for these new

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[2] The North American Regional Broadcasting Agreement designates seven frequencies (540 kHz, 690 kHz, 740 kHz, 860 kHz, 990 kHz, 1010 kHz, and 1580 kHz) as Canadian Clear Channels and one frequency (1540 kHz) as a Bahamian Clear Channel. The United States/Mexican Bilateral AM Agreement designates seven frequencies (540 kHz, 730 kHz, 800 kHz, 900 kHz, 1050 kHz, 1220 kHz, and 1570 kHz) as Mexican Clear Channels. Because the frequency of 540 kHz appears on both the Canadian and Mexican lists, the total number of frequencies involved is 14.

[3] Report and Order in Docket No. 20642, *Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C. 2d 1345 (1980), *recon. denied*, 83 F.C.C. 2d 216 (1980).

Class II stations. In issuing the present *Notice*, the Commission noted the relatively short time that had elapsed since adoption of the 1980 *Report and Order* and asked commenting parties to express their views on whether the relevant portion of the Section 73.37(e) standards adopted in that proceeding should also be adopted here. Generally, under Section 73.37(e) of the Commission's rules, in order to be acceptable for filing, applications must propose service to unserved or underserved areas or to communities lacking sufficient local service.[4] In addition, on the U.S. I-A Clear Channels, that section permits the acceptance of applications proposing minority-owned stations or ones that would provide noncommercial radio service.

5. Recently, the Commission issued a *Notice of Proposed Rule Making* in MM Docket No. 85-39 proposing to delete the go/no-go provisions of Section 73.37(e) which impose these acceptance criteria in addition to interference protection standards. In that proceeding the Commission is exploring whether these provisions continue to serve any useful purpose in view of the fact that they block the establishment of many otherwise acceptable applications on currently available spectrum merely because they do not meet these criteria.

6. The *Notice* also directed attention to the technical characteristics applicable to Class II-B proposals on the U.S. Clear Channels. Applicants proposing to provide a first nighttime primary service to at least 25 percent of the area or population they would serve were permitted to operate at night at a maximum power of 50 kW. These operations are protected at night to the limit imposed by the co-channel Class I-A station or the higher limit, if any, imposed by other previously authorized co-channel stations. On the other hand, Class II-B applicants not able to meet this standard were limited to 1 kW nighttime power and were normally protected at night only to their 10 mV/m contour. Because of its experience in the prior proceeding, the Commission proposed a maximum nighttime power of 1 kW on the foreign clear channels except where an applicant proposes to provide a first nighttime primary service to at least 25 percent of its coverage area, in which case the maximum nighttime power would be 50 kW. As with the U.S. clear channels, nighttime protection normally would be to the 10 mV/m and 2.5 mV/m contours, respectively. However, unlike the action in Docket No. 20642, the

[4] Subparagraph (i) of Section 73.37(e) specifies that at least 25 percent of the area or population to receive interference-free primary nighttime service does not receive such service from an existing AM station or from any FM station with a signal strength of 1 mV/m or greater; subparagraph (ii) specifies that the community designated in the application must be provided with a first or second aural nighttime service and no FM channel is available for use in the community, and subparagraph (iii) specifies that at least 20 percent of the area or population of the designated community receives fewer than two aural services at night and no FM channel is available for use in the community.

Commission did not here propose to protect any Class II station at night to a contour of less than 2.5 mV/m.[5]

7. Finally, although the Commission, in Docket No. 20642, did not separately designate Class II stations based on power limitations and protection standards, in the *Notice* in this proceeding it proposed to amend the Rules by designating those Class II stations operating at 1 kW and protected to their 10 mV/m contours as "Class II-C." All other new full-time Class II stations, *i.e.*, those providing wider area service, would be designated "Class II-B." These designations would be applicable to all the Class II full-time stations that had been or would be authorized on the domestic Class I-A clear channels and to the new stations to be established on the newly available foreign clear channels that are the subject of this proceeding.

Comments

8. By far, the majority of comments in response to the *Notice* were submitted by or on behalf of daytime-only stations. They argued that the Commission should use this opportunity to authorize nighttime service by existing daytime-only stations on the affected foreign clear channels. They opposed use of the acceptance criteria which had been proposed, as this would deny the opportunity for full-time operation for many daytime-only stations. Several of these commenters point out that daytime-only stations suffer a competitive disadvantage vis-a-vis full-time AM and FM facilities and, due to their limited operating hours, have difficulty providing effective service to their communities. Although they acknowledge the efforts of the Commission to alleviate their plight through post-sunset operation, they continue to face serious problems. Daytime-only stations are said to render valuable service to their communities despite being unable to reap the benefits of full-time operation. Thus, they are seen as appropriate beneficiaries of the newly available spectrum.

9. Proponents for daytime-only stations note that unlike the situation relating to domestic clear channels in Docket No. 20642, many daytime-only stations already operate on the affected foreign clear channels. As a result, these frequencies cannot be used to any significant degree to respond to the need for new stations. They also contend that application of the proposed acceptance criteria would not accomplish the desired results, as there are few unserved areas which would be able to support a station. Moreover, the Associated Communications Corporation and United Broadcasting Company contend that there will be a way of meeting these needs

[5] The Commission indicated in the *Notice* that, as a practical matter, it did not expect that this would significantly affect the ability to provide wide-area service, as few new stations were anticipated to be able to achieve nighttime limits less than 2.5 mV/m due to the large number of foreign stations that are already operating on the channels involved.

through new FM stations to be authorized as a result of Commission action in BC Docket No. 80-90.[6]

10. Other comments took a different view, asserting that not enough new stations had been created as the result of the Commission's Clear Channel decision in Docket No. 20642. For example, the National Black Media Coalition ("NBMC") argues that few minority stations were created and that the need for minority stations has remained unmet. Moreover, NBMC notes that many of the stations created as a result of new FM assignments in BC Docket No. 80-90 will be in small communities with little minority populations. Finally, a few commenters suggest that preferential treatment should be afforded to stations which filed expressions of interest in the course of bilateral negotiations with Canada. National Radio Broadcasters Association ("NRBA") would eliminate all threshhold criteria and replace them with standards based solely on interference considerations. The Association for Broadcast Engineering Standards suggests adoption of an additional alternative acceptance criteria for daytime-only stations in order to encourage full-time service.

11. In addition to alternative procedures to implement night service by existing daytime-only stations on the Canadian, Mexican, and Bahamian Clear Channels, various parties offered suggestions on the power levels which should be permitted. Some believe that nighttime operating powers of up to 5 kW are warranted in order to provide improved service. In this regard, WGSM Radio, Inc., points to the example of Canada and Mexico, both of which permit greater power than was proposed in the *Notice.* Others would allow nighttime operation at a power up to that authorized for daytime hours, while the NAB would allow any power that is consistent with the Region 2 Agreement. NAB criticizes the 1 kW proposal as wasteful of spectrum resources and as failing to take full advantage of international agreements authorizing nighttime operation. Finally, various suggestions related to establishment of the normally protected contour ranged from 2.0 mV/m to 10 mV/m. Necessarily, the higher the protection level, the fewer the services that would be possible.

Discussion

12. In order to evaluate the various possible uses of these frequencies, it was necessary to perform intensive and wide-ranging studies to examine the potential value these frequencies could have in responding to various types of requirements.[7] They were designed to determine whether

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[6] *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments,* 94 F.C.C. 2d 152 (1983), *recon. denied,* FCC 84-65, March 1, 1984.

[7] The following studies were initially performed by the Commission on sample foreign clear channels: (1) daytime service and interfering contours of existing daytime-only and fulltime stations were plotted (using the M3 map of ground conductivity). This showed the

these frequencies lend themselves to the establishment of new full-time operations, or could be better used to make it possible for daytime-only stations to operate at night. It also was important to see if it would be possible to harmonize these two apparently conflicting goals. As these studies were completed, several points became clear. In much of the country, particularly the populous areas, these frequencies could not be used to create new stations, full-time or otherwise, without causing destructive interference to the existing daytime-only and full-time stations on the channels.[8] In these areas, the only choice is permitting the channels to be used at night by the daytime-only stations or allow the frequencies to lie fallow in major portions of the country. Obviously, the latter course would serve no useful purpose. Moreover, it would unnecessarily limit daytime-only stations in their efforts to compete more effectively in the marketplace and thereby enhance their ability to serve the public.

13. Although the above situation applies in much of the country, there are areas where new full-time stations could be established.[9] Here, too, no purpose would be served by imposing acceptance criteria. Because the areas in which these new stations would be located are concentrated in the unserved or underserved portions of the country, acceptance criteria are not needed to funnel growth toward areas of greatest need. Moreover, these frequencies would continue to be available for minority or public radio applicants.

14. Having decided that the frequencies can be used to establish new stations as well as give nighttime operation to daytime stations, the Commission needs to decide how best to accomplish these purposes. This requires consideration of the interrelated matters of the power to be used and the interference protection to be afforded. In addition, consideration must be given to the administrative mechanisms to be employed to bring about the desired result. Each of these points requires separate treatment. The arrangements to be applied to daytime-only stations will be

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extent to which the channel already was used; (2) this, in turn, made it possible to identify areas where existing operations do not preclude addition of new stations daytime; (3) to determine the potential for nighttime operation, the nighttime RSS limits of daytime-only stations on the sample frequencies which result from existing domestic and foreign stations were calculated, and (4) the potential for new stations was examined by selecting for study hypothetical locations in the open areas determined in (2), above, and RSS limits at such points were computed. The summary results of these studies are set forth in Appendix C.

[8] Appendix C illustrates the limited areas in which new AM stations could be established on the frequencies without causing such interference.

[9] Although it would be possible to create new daytime-only stations in these areas, such a result would only perpetuate the problem of stations that are unable to compete effectively because of limits on their hours of operation. As a result, the rules will make it clear that new daytime proposals on these frequencies will not be accepted for filing.

described first. Then, it will be possible in the subsequent discussion to contrast the treatment to be afforded proposals for new stations on these channels.

Technical Criteria

15. Only in limited areas would it be possible to establish new full-time stations. Even in such locations, protection requirements to existing foreign and domestic fulltime stations preclude use of the frequencies for higher powered stations. Allowing such higher power also would not provide for an efficient distribution of facilities because the typically high limits on these channels preclude effective wide-area service. Further, allowing these stations to seek higher power is not feasible in view of their proximity to one another and could have the effect of precluding otherwise possible nighttime operations by other daytime-only stations. This has led the Commission to conclude that stations operating on the affected foreign clear channels should be permitted to operate at night, ultimately with maximum power of 1 kW, if consistent with applicable nighttime protection requirements. However, as described below, during a five-year transitional period, a 500-watt limit would apply.

16. The next point to consider is the signal level to protect after the transitional period comes to an end. Considering the existing channel loading and the limited potential for use of these frequencies makes it clear that it would be inappropriate to protect low nighttime signal levels. Moreover, such protection is not possible if daytime-only stations are to be able to operate at night. Protecting low limits is equally infeasible in other areas as well. Our studies have indicated that interference from existing foreign and domestic full-time stations would typically limit nighttime service from existing daytime-only stations (as well as new full-time stations) to their 10 mV/m contours or higher. Accordingly, we have concluded that these stations should be normally protected at night to their 10 mV/m contours. Also, we believe that a minimum power of 250 watts is required in order to be entitled to protection. The nighttime power limits being adopted here are the same as the Commission generally made applicable to stations seeking to operate on the 25 domestic Class I-A channels which were the subject of Commission action in Docket No. 20642.[10] Further, the 10 mV/m contour that Class II stations here must protect each other to is identical to that which the Commission determined in Docket No. 20642 to be the optimal balance between adequate service areas and maximum number of stations.

[10] *See*: Section 73.21(a)(ii)(C) and (D) of the Rules. Stations providing wide area service to underserved areas as provided in §73.37(e)(i) were allowed to operate at higher nighttime power levels.

17. In establishing these standards we were mindful of the fact that there will be two categories of stations operating at night on these frequencies. Some will come from the new full-time operations made possible by the changed status of these frequencies. By far, the larger portion will be former daytime-only stations which will be operating at night for the first time. In fact, all of these stations will be able to operate at night if they choose to do so. Necessarily, there will be restrictions imposed on these stations by virtue of their need to protect existing full-time stations on the channel, both foreign and domestic. There would be additional effects if these daytime-only stations were required to protect one another at night. However, that would produce major complications and delays in implementing the new rules. Considerable cost would be involved for each station in determining just what protection to provide, and this protection could change with each grant that was made. Finally, as appendix C indicates, in most cases this is an unnecessary matter in any event because of existing elevated levels of interference.

18. For some daytime-only stations, the need to provide protection at night to full-time stations will have little or no effect. For others, it can mean that a substantial reduction in power would be needed when using existing antenna systems, often to a level well below the 250 watt minimum power specified by the Commission's rules. Whatever view we might take in regard to authorizing such low power for new stations, the fact is that for these daytime-only stations, such nighttime power can be justified in terms of the channel loading that already exists and the service these stations can be expected to provide. While that service may indeed be limited, the only other choice is to preclude such service entirely, and that would unfairly deprive these stations and their communities of needed service at night. Thus, during the implementation described below, daytime stations can be authorized nighttime operation and new fulltime stations can be established, but in both cases, nighttime protection to one another will not be required. Thereafter, protection to at least some of the nighttime operations would be warranted. Although it is feasible to allow low power operation, the studies have shown that it would not be feasible to protect these operations having less than 250 watts. As a result, stations that operate with 250 watts or more at night will become protected under the procedures described below, but those that operate with lesser power levels will not be protected now or in the future. In order to obtain such protection, these stations will need to follow the prescribed procedures for increasing power and acquiring protection thereby. Alternatively, they can continue to operate at lower power levels without protection.

19. From now on, neither the new fulltime stations or the daytime-only stations obtaining nighttime operation by virtue of the procedures

outlined below will be subject to the requirements of Section 73.24(j) of the rules regarding city grade coverage at night. To apply these provisions to the daytime-only stations would be impractical in light of the reduced nighttime power required to protect the full-time foreign and domestic co-channel stations and the limited flexibility that many daytime-only stations will have in designing new antenna systems. In addition, it is possible that daytime-only stations will receive high limits and for that reason may be unable to serve their entire community. Although it is appropriate to require new stations to comply with city coverage requirements daytime, it is not possible to do so at night without creating conflicts with other applications. The absence of a city coverage requirement at night does not represent an ideal situation. Nonetheless, as with the matter of authorized power, insisting on compliance with the Commission's coverage rules at night will defeat the opportunity for new nighttime services.

Implementation

20. There can be no question that the expeditious authorization of nighttime service on the foreign clear channels here is in the public interest. Accordingly, the Commission has devoted considerable effort to the formulation of a procedure which can effectuate such service in the most efficient manner. Two points became clear immediately. Implementation would be delayed considerably if it had to be handled entirely by traditional application processes. Perhaps even more important, the initial step for permitting nighttime operation by daytime-only stations requires engineering calculations of great complexity. Requiring each party to perform these calculations would impose an enormous burden on applicants. Then, the Commission would be faced with verifying these calculations before granting the necessary authorization. The problem can be overcome if the Commission performs the calculations itself using the existing daytime or Canadian restricted antenna system and notifies each station of the power it can use. Such a procedure would parallel the one utilized by the Commission in its post-sunset power calculations for these same stations.[11]

21. Likewise, there is no need for the Commission to insist on the filing of applications to acquire this nighttime authorization. Instead, it can follow the same Show Cause Order approach that was used to bring about the Class IV AM nighttime power increases. In the present case, this involves the issuance of a Show Cause Order to each affected daytime-only station telling it that, absent objection, its license will be modified to specify nighttime operation with the power specified. Some

[11] It will be possible for Class II-S stations to continue to utilize these secondary authorizations which were calculated based on full protection.

stations may not choose to utilize this opportunity because they consider the power to be below their needs or because they do not wish to comply with the minimum operating requirements which will apply to these nighttime operations. Other stations may wish to use this authority but may need a delay before operation could begin. To deal with these problems the following procedure will be used. Stations will have one year from the date of the Show Cause Order in which to begin operation at night. Although it is under no obligation to operate under this authority, it will expire under its own terms if not used by then. In addition, before such operation can begin, the licensee will have to indicate its intention to do so and to provide limited engineering data about the operation. Then, operation can begin immediately upon sending this information to the Commission.

22. During a five-year period after the issuance of the Show Cause Orders, the station may continue to operate at night with the power set forth in the Show Cause Order. It also may file an application to increase that power up to a maximum of 500 watts but not to exceed its authorized daytime power.[12] In doing so it will be necessary to protect the fulltime domestic and foreign stations now operating. However, it will not be necessary to provide nighttime protection to the new stations to be authorized or to the nighttime operations of other former daytime-only stations. Likewise, a newly authorized station seeking a subsequent increase in nighttime power to 500 watts is subject to the same interference protection requirements. This situation will continue for five years to provide ample opportunity for any desired increases in power. Instead of making a change on its current channel, it may conclude that it is preferable to propose operation on another channel. Such applications will be acceptable for filing, and will be treated in the same fashion as applications for new stations on those channels. Finally, as noted earlier, only stations that initially obtain operation with 250 watts or more or subsequently increase to that level will be entitled to protection after this five-year period ends.

23. After this five year period ends, two basic changes will occur. First, the maximum nighttime power will be increased to 1 kW, and existing stations will be able to propose increasing their power to this level. However, all existing nighttime operations of 250 watts or more will be protected from additional interference. This includes the former daytime-only stations. In addition, applications for new stations can

[12] Because of the special circumstances presented by this case, it is appropriate to provide a partial exception to the requirement that power increase applications must specify an increase of a specific percentage. A former daytime station may seek a lesser increase so long as that increase is sufficient to bring it to the protected level of 250 watts or more.

continue to be filed, and they will be subject to the same requirements as to power level and interference protection.

24. The Commission intends that nighttime operations on the affected foreign clear channels be effectuated as soon as practicable. Since an appropriate bilateral agreement with Canada has been reached, the amendments to the Rules as they apply to the Canadian Clear Channels herein will be effective as of the date indicated below.[13] However, since bilateral negotiations with Mexico and with The Bahamas are in progress, the effective date of the amendments as they apply to the Mexican[14] and Bahamian Clear Channels will be as announced subsequently.

25. *Class II-C Designations.* There is one final matter to consider. Consistent with the Commission's proposal as set forth in the *Notice*, the Class II stations operating on the 25 domestic clear channels which were the subject of Commission action in Docket No. 20642 will be redesignated as either "Class II-B" or "Class II-C", as the case may be. Specifically, those Class II stations operating at up to 50 kW and accepted in accordance with Section 73.21(a)(ii)(D) of the rules will be designated "Class II-B,"[15] while those accepted on the basis of Section 73.21(a)(ii)(C) of the rules will be designated "Class II-C." Although this specific proposal to redesignate these channels was not addressed in the comments, it appears, as it did previously, prudent to do so in the interest of clarity. Further, all daytime-only stations that elect to operate nighttime and new fulltime stations that are granted on these foreign Clear Channels will be designated as "Class II-C" stations if they utilize 250 watts or more at night. Those using a lower nighttime power will be designated as "Class II-S" stations.

Paperwork Reduction Act

26. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labelling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

Regulatory Flexibility Analysis

I. Need and Purpose of the Rules

These rules are designed to permit daytime-only AM broadcast stations operating on Canadian, Mexican, and Bahamian Clear Channels to provide nighttime service. Additionally, these rules provide power and protection standards as well as a procedure for implementing such service and

[13] This does not include 540 kHz.

[14] This includes 540 kHz.

[15] This includes applications on file as of the effective date of the rules being adopted in this proceeding, to which the current standards would continue to be applied.

standards. Finally, Class II stations operating on both domestic and foreign clear channels are designated according to their operating powers. The new rules can be expected to benefit many small entities, particularly daytime-only stations which will obtain nighttime operating authority for the first time.

II. Summary of Issues Raised by Public Comment in Response to the Initial Notice of Proposed Rule Making

No issues of significance were raised in addition to those set forth above.

III. Significant Alternatives Considered and Rejected

Alternative procedures regarding implementation of nighttime service on the foreign clear channels here, including application of the threshhold criteria provided in Section 73.37(e) of the Commission's Rules, have been considered and rejected for the reasons set forth above. Similarly, alternative technical standards regarding power limitations and protection have been found to be inappropriate for the reasons indicated.

27. Accordingly, IT IS ORDERED, That Part 73 of the Commission's rules IS AMENDED effective June 3, 1985, as set forth in Appendix A.

28. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

29. Authority for this action is contained in Sections 4(i), 303 and 307(b) of the Communications Act of 1934, as amended.

30. For further information concerning this proceeding, please contact Joel Rosenberg, (202) 634-6530, or Jonathan David (202) 632-7792, both of the Policy and Rules Division, Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix B-may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

Appendix A

1. 47 C.F.R. Part 73 is amended by revising paragraph (a) of Section 73.21 to read as follows:

§73.21 Classes of AM broadcast channels and stations.

(a) * * *

* * * * *

(2) Class II station. A class II station is a secondary station which operates on a clear channel (see §73.25) and is designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations. Whenever necessary a Class II station shall use a directional antenna or other means to avoid interference with Class I stations and with other Class II stations, in accordance with §73.182 (and §73.22 in the case of Class II-A stations). Class II stations are divided into five groups:

(i) * * *

(ii) *Class II-B station.* A Class II-B station is an unlimited time Class II station other than those included in Class II-A, II-C, and II-S. Except as subparagraphs (a)(2)(ii)(A) and (B) of this section provide otherwise, a Class II-B station shall operate with a power not less than 0.25 kW nor more than 50 kW.

(A) Class II-B stations authorized before June 1, 1985, to operate on any of the 25 Class I channels listed in §73.25(a) shall operate with the powers authorized as of June 1, 1980, or such other power as the Commission may subsequently authorize. Class II-B stations on these channels authorized after June 1, 1980, in the contiguous 48 states, must meet the requirements for primary service set out in §73.37(d)(2)(i).

(B) Class II-B stations authorized before _____, 1985, to operate on any of the 14 channels listed in §73.25(c) shall operate with the powers authorized as of June 3, 1985, or such other power as the Commission may subsequently authorize during Stage 3 or the process described in §73.357(d)(4).

* * * * *

(iii) Class II-C station. A Class II-C station is an unlimited time Class II station which operates with a daytime power of not less than 0.25 kW nor more than 50 kW and a nighttime power of not less than 0.25 kW nor more than 1 kW as follows:

(A) Class II-C stations authorized after June 1, 1980, on the 25 channels listed in §73.25(a) are those which do not meet the requirements for primary service set out in §73.37(e)(2)(i).

(B) Class II-C stations authorized after June 3, 1985, on the 14 channels listed in 73.25(c).

(iv) *Class II-D stations.* A Class II-D station is a Class II station operating daytime or limited time. A Class II-D station shall operate with power not less than 0.25 kW nor more than 50 kW.

(v) *Class II-S stations.* Class II-S stations are former Class II-D stations which have been authorized limited power operation during nighttime on the 14 channels listed in §73.25(c). Class II-S stations operate with power less than 250 watts nighttime without protection from interference.

* * * * *

2. 47 C.F.R. Part 73 is amended by revising paragraph (j) of Section 73.24 to read as follows:

§73.24 Broadcast facilities; showing required.

* * * * *

(j) That the 5 mV/m contour (or, at night, the interference-free contour, if of a higher field strength) encompasses the entire principal community to be served. For Class II-C and II-S stations on the 14 frequencies listed in §73.24 (c) it is not necessary to demonstrate the ability to provide such coverage during nighttime operation.

* * * * *

3. 47 C.F.R. Part 73 is amended by revising paragraphs (a), (b) and (c) of Section 73.25 and by deleting paragraphs (d) and (e) of that Section to read as follows:

§73.25 Clear channels: Classes I and II stations.

* * * * *

(a) * * *

* * * * *

(2) * * *

(i) * * *

(ii) Additional unlimited time Class II-B and II-C stations authorized after June 1, 1980.

(iii) * * *

Note 1: * * *

Note 2: See the U.S./Mexican Agreement concerning Mexican use of 660, 760, 830, 1020, 1030, and 1180 kHz.

(b) * * *

Note: Until superseded by a new agreement, protection of the Bahama Islands shall be in accordance with NARBA. Accordingly, Class I and Class II stations on 1540 kHz shall deliver not over 4 uV/m groundwave or 25 uV/m skywave at any point of land in the Bahama Islands and such stations operating nighttime (i.e., sunset to sunrise at the location of the U.S. station) shall be located not less than 650 miles from the nearest point of land in the Bahama Islands. Also see paragraph (c) for additional provisions relating to Class II stations on this frequency.

(c) For Class II stations on 540, 690, 730, 740, 800, 860, 900, 990, 1010, 1050, 1220, 1540, 1570, and 1580 kHz. Effective June 1, 1985, no applications for new Class II-D stations will be accepted on these channels.

Note 1: The U.S./Mexican Agreement is undergoing renegotiation. Until the new Agreement is completed, no applications involving new nighttime operation or major change in existing nighttime operation on 540 kHz except for Alaska, or on 730, 800, 900, 1050, 1220, and 1570 kHz will be accepted for filing. Also, pending completion of negotiations with the Commonwealth of the Bahamas, 1540 kHz is subject to the same restrictions.

4. 47 C.F.R. Part 73 is amended by revising paragraphs (a) and (e) of Section 73.37 to read as follows:

§73.37 Applications for broadcast facilities, showing required.

(a) Except as indicated in other paragraphs of this section, no application will be accepted for a new station (or change in frequency of an existing station) if the proposed operation would involve overlap of signal strength contours with any other station as set forth below in this paragraph; and no application will be accepted for a change (other than a change in frequency) of the facilities of an existing station (including the daytime facilities of an existing Class II-A station) if the proposed change would involve such overlap where there is not already such overlap between the stations involved:

Frequency separation	*Contour of Proposed new station (Classes II-B, II-C, II-D, II-S' III, and IV) mV/m*	*Contour of any other station*
Co-channel	0.005	0.1 mV/m (Class I)
	0.025	0.5 mV/m (Other classes)
	0.5	0.025 mV/m (All classes)
10 kHz	0.5	0.5 mV/m (All classes)
20 kHz	2	25 mV/m (All classes)
	25	2 mV/m (All classes)
30 kHz	25	25 mV/m (All classes)

* * * * *

(e) In addition to a demonstration of compliance with the requirements of paragraphs (a), and as appropriate, (b), (c) and (d) of this section, an application for a new AM broadcast station, or for a major change (see §73.3571(a)(1) of this chapter) in an authorized AM broadcast station, as a condition for its acceptance, shall make a satisfactory showing, if new or modified nighttime operation by a Class II or Class III station is proposed, that objectionable interference will not result to an authorized station as determined pursuant to §73.182(o) of this chapter. Separate interference requirements are applicable to Class II-C and Class II-D stations on the 14 frequencies listed in §73.25(c). In addition, for all classes of stations on these 14 frequencies, except Class II-C or II-S, a satisfactory showing is required as indicated below for the kind of application submitted.

(1) * * *

* * * * *

(2) * * *

(i) - (iii) * * *

(iv) That minority persons hold over 50% of the ownership interests in the applicant for a Class II-B or Class II-C station on one of the 25 Class I channels listed in §73.25(a), or,

(v) That the applicant proposes to operate a Class II-B or Class II-C station noncommercially on one of the 25 Class I channels listed in §73.25(a).

Note Applications for new Class II-D or Class II-S stations on the 14 frequencies listed in §73.25(c) are not acceptable for filing. However, applications for changes in the facilities of existing Class II-D or Class II-S are acceptable for filing, subject to the limitations specified in §73.3571 of this chapter.

* * * * *

5. 47 C.F.R. Part 73 is amended by renumbering subparagraph (f)(2)(iii) of Section 73.51 as (f)(2)(ii) and by revising the text of this subparagraph to read as follows:

§73.51 Determining operating power.

* * * * *

(f) * * *

(1) * * *

(2) * * *

(i) * * *

(ii) The value determined by reference to the following table:

Factor (F)	*Method of Modulation*	*Maximum Rated carrier power*	*Class of amplifier*
0.70	Plate	1 kW or less	
.80	Plate	2.5 kW and over	
.35	Low Level	0.25 kW and over	B
.65	Low Level	0.25 kW and over	BC[1]
.35	Grid	0.25 kW and over	

[1] All linear amplifier operation where efficiency approaches that of class C operation

6. 47 C.F.R. Part 73 is amended by revising subparagraph (c)(1) of Section 73.99 to read as follows:

§73.99 Pre-Sunrise service authorization (PSRA) and Post-Sunset service authorization (PSSA).

* * * * *

(c) * * *

(1) Class II-D stations located on Mexican, Bahamian, and Canadian Class I-A and I-B Clear Channels to commence PSSA operation at sunset times specified in their basic instruments of authorization and to continue for two hours after such specified times. In addition, Class II-S stations may operate pursuant to their Post-Sunset authority in lieu of their licensed nighttime power.

* * * * *

7. 47 C.F.R. Part 73 is amended by revising subparagraph (a)(iii) of Section 73.182, and by adding new subparagraph (a)(iv) and a Note to read as follows:

73.182 Engineering standards of allocation.

(a) * * *

* * * * *

(2) Class II stations are secondary stations which operate on clear channels with powers not less than 0.25 kW nor more than 50 kW, except that Class II-A stations shall not operate nighttime with less than 10 kW; Class II-C stations shall not operate nighttime with more than 1 kW, and Class II-S stations shall operate nighttime with less than 250 watts. Class II stations are required to use directional antennas or other means to avoid causing interference with the normally protected service areas of Class I stations or other Class II stations. (For special rules concerning Class II-A stations, see 73.22.) These stations normally render primary service only, the area of which depends on the geographical location, power, and frequency. This may be relatively large but is limited by and subject to such interference as may be received from Class I stations. However, it is recommended that Class II stations be so located that the interference received from other stations will not limit the service area to greater than 2.5 mV/m groundwave contour nighttime and 0.5 mV/m groundwave contour daytime, which are the values for the mutual protection of this class of stations with other stations of the same class. There are four exceptions:

(i) * * *

* * * * *

(iii) Class II-C stations are normally protected at nighttime to their 10 mV/m groundwave contour, or the higher limit if any imposed by previously authorized facilities of other stations.

(iv) Class II-S stations are not protected from interference during nighttime.

Note: There are additional restrictions in the use of the 14 channels listed in §73.25(c). These restrictions are set forth in §73.3571.

* * * * *

8. 47 C.F.R. Part 73 is amended by revising subparagraph (o)(1) of Section 73.182 to read as follows:

73.182 Engineering standards of allocation.

* * * * *

(o) * * *

(1) With respect to the root-sum-square values of interfering field strengths referred to in this section (except in the case of Class IV stations on local channels and interfering signals to Class II-S stations) calculation is accomplished by considering the signals in order of decreasing magnitude, adding the squares of the values and extracting the square root of the sum, excluding those signals which are less than 50% of the RSS values of the higher signals already included.

* * * * *

9. 47 C.F.R. Part 73 is amended by revising the text of, but not the format of, the chart contained in paragraph (v) of Section 73.182 to read as follows:

§73.182 Engineering standards of allocation.

* * * * *

(v) Protected service contours and permissible interference signals for broadcast stations are as follows (for Class I and Class II-A stations, see paragraph (a) of this section):

Class of station	*Class of channel used*	*Permissible power*	*Signal strength contour of area protected from objectionable interference*[1]		*Permissible interfering signal on same channel*[2]	
			Day[3]	*Night*	*Day*	*Night*[4]
I-A	Clear	50 kW	SC 100 μV/m. AC 500 μV/m.	SC 500 μV/m(50% skywave)[7] AC 500 μV/m[3]	5 μV/m	25 μV/m[7]
I-B	do	10 kW to 50 kW	SC 100 μv/m. AC 500 μV/m.	SC 500 μV/m 50% skywave. AC 500 μV/m[3]	5 μV/m	25 μV/m
II-A	do	0.25 kW to 50 kW (daytime). 10 kW to 50 kW (nighttime).	500 μV/m	500 μV/m[3]	25 μV/m	Do.
II-B	do	0.25 kW to 50 kW	500 μV/m	2500 μV/m[3] [5]	do	125 μV/m
II-C	do	0.25 kW to 1 kW	do	10,000 μV/m[8]	do	500 μV/m
II-D	do	0.25 kW to 50 kW (daytime)	do	not prescribed	do	500 μV/m
II-S	do	0.25 kW to 50 kW (daytime)	do	not prescribed	do	not prescribed
		less than 0.25 (nighttime)	do	not prescribed	do	not prescribed

Class of station	*Class of channel used*	*Permissible power*	*Signal strength contour of area protected from objectionable interference*[1]		*Permissible interfering signal on same channel*[2]	
			Day[3]	*Night*	*Day*	*Night*[4]
III-A	Regional	1 kW to 5 kW	do	2500 $\mu V/m$[3]	do	125 $\mu V/m$
III-B	do	0.5 to 1 kW (night),	do	4000 $\mu V/m$[3]	do	200 $\mu V/m$
IV	Local	0.25 to 1 kW	do	Not prescribed[6]	do	Not prescribed

[1] When a station is already limited by interference from other stations to a contour of higher values than that normally protected for its class, this contour shall be the established standard for such station with respect to interference from all other stations.

[2] For adjacent channel, see paragraph (w) of this section.

[3] Groundwave.

[4] Skywave field strength for 10 percent of more of the time.

[5] These values are with respect to interference from all stations except Class I-B, which stations may cause interference to a field strength contour of higher value. However, it is recommended that Class II stations be so located that the interference received from Class I-B stations will not exceed these values. If the Class II stations are limited by Class I-B stations to higher values, then such values shall be the established standard with respect to protection from all other stations.

[6] See paragraph (a)(4) of this section.

[7] Class I-A stations on channels reserved for the exclusive use of one station during nighttime hours are protected from co-channel interference on that basis.

[8] Applies only to nighttime operations of Class II-C stations coming within §73.21(a)(iii), and to the operation of limited-time Class II-D stations during nighttime hours other than those during which they were authorized to operate as of June 1, 1980.

SC=Same channel.
AC=Adjacent channel.

10. 47 C.F.R. Part 73 is amended by revising the note to Section 73.183(b) to read as follows:

§73.183 Groundwave signals

* * * * *

(b) * * *

Note: International agreement in the matter of standards for good engineering practice concerning determination of ground conductivity by field strength measurements has not been arrived at as contemplated by NARBA, and the United States has no established procedures for reciprocal consideration of such measurements with any country except Canada. Therefore, groundwave field strength measurements will not be accepted or considered for the purpose of establishing that interference to a station in a foreign country other than Canada, or that the signal strength at the border thereof, would be less than indicated by the application of the ground conductivity maps and engineering standard contained in this part and applicable international agreements. Satisfactory groundwave measurements offered for the purpose of demonstrating values of conductivity other than those shown by Figure M3 in problems involving protection of Canadian stations will be considered only if, after review thereof, the appropriate agency of the Canadian government notifies the Commission that they are acceptable for such purpose.

* * * * *

11. 47 C.F.R. Part 73 is amended by revising paragraph (d) of Section 73.3571 to read as follows:

§73.3571 Processing of AM broadcasting station applications.

* * * * *

(d) * * *

(1) In order to be acceptable for filing, any application other than those filed under subparagraph (4) below which does not involve a change in site and which is filed before June 3, 1988, must propose at least a 50% increase in the station's nominal power. However, applications proposing at least a 20% increase and which are in conflict with an application proposing a 50% increase are acceptable for filing.

* * * * *

(4) Special procedures apply to the 14 frequencies listed in §73.25(c). The same procedures will be applied to each of the three frequencies or groups of frequencies which are included in the above category. There are three stages to these procedures. In the first Stage, each Class II-D station will receive an Order to Show Cause why its license should not be modified to specify operation at night with the power calculated by the Commission and as shown on said Order. Stations accepting this modification will be redesignated as Class II-C if the nighttime power is 250 watts or more or as Class II-S if that power is below 250 watts. During Stage two, stations in both groups will be given five years within which to file an application to increase this power to a maximum of 500 watts on their daytime power, whichever is lower. During this period, applications for new Class II-C stations also can be filed and will be granted without regard to the nighttime interference caused to other Class II-C or to Class II-S stations but new Class II-C stations will be required to protect foreign and domestic Class II-B full-time stations on these frequencies. Finally, in Stage 3, which occurs when the five-year period above comes to an end, Class II-C and II-S stations will be able to file applications to increase their nighttime power to 1 kW or their daytime power, whichever is lower. Applications for new Class II-C stations can also be filed specifying a maximum nighttime

power of 1 kW. However, any applications in either category must protect existing Class II-C stations (including Class II-S stations that increased power during Stage 2 and were redesignated as Class II-C during this period). The five-year periods of Stage 2, applicable to the three groups of frequencies, are set forth below:

(i) 690 kHz, 740 kHz, 860 kHz, 990 kHz, 1010 kHz and 1590 kHz: Stage 2 begins on June 3, 1985 and ends on May 31, 1990; Stage 3 begins on June 1, 1990.

(ii) 1540 kHz [to be established]

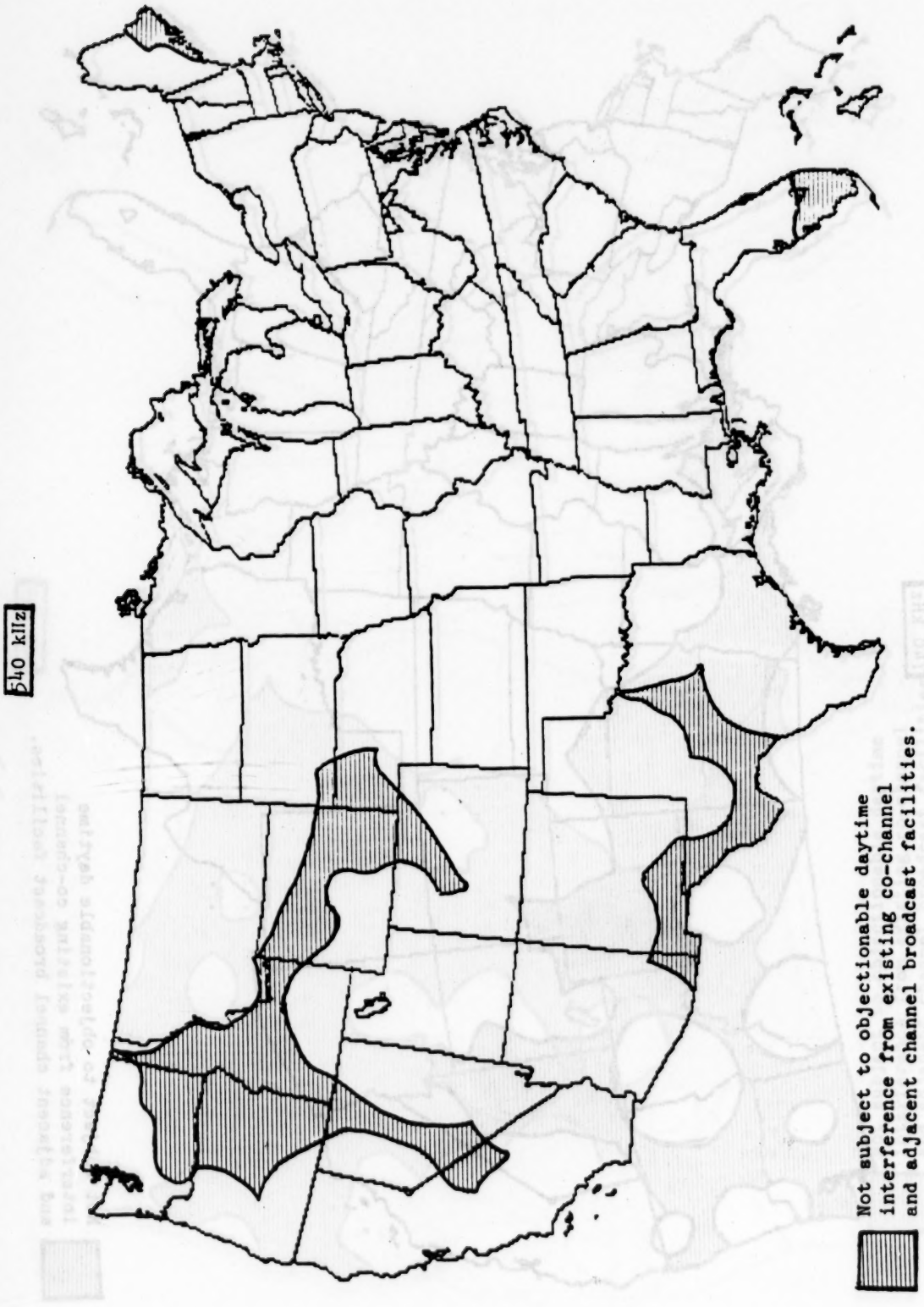
(iii) 540 kHz, 730 kHz, 800 kHz, 900 kHz, 1050 kHz, 1220 kHz and 1580 kHz: [to be established]

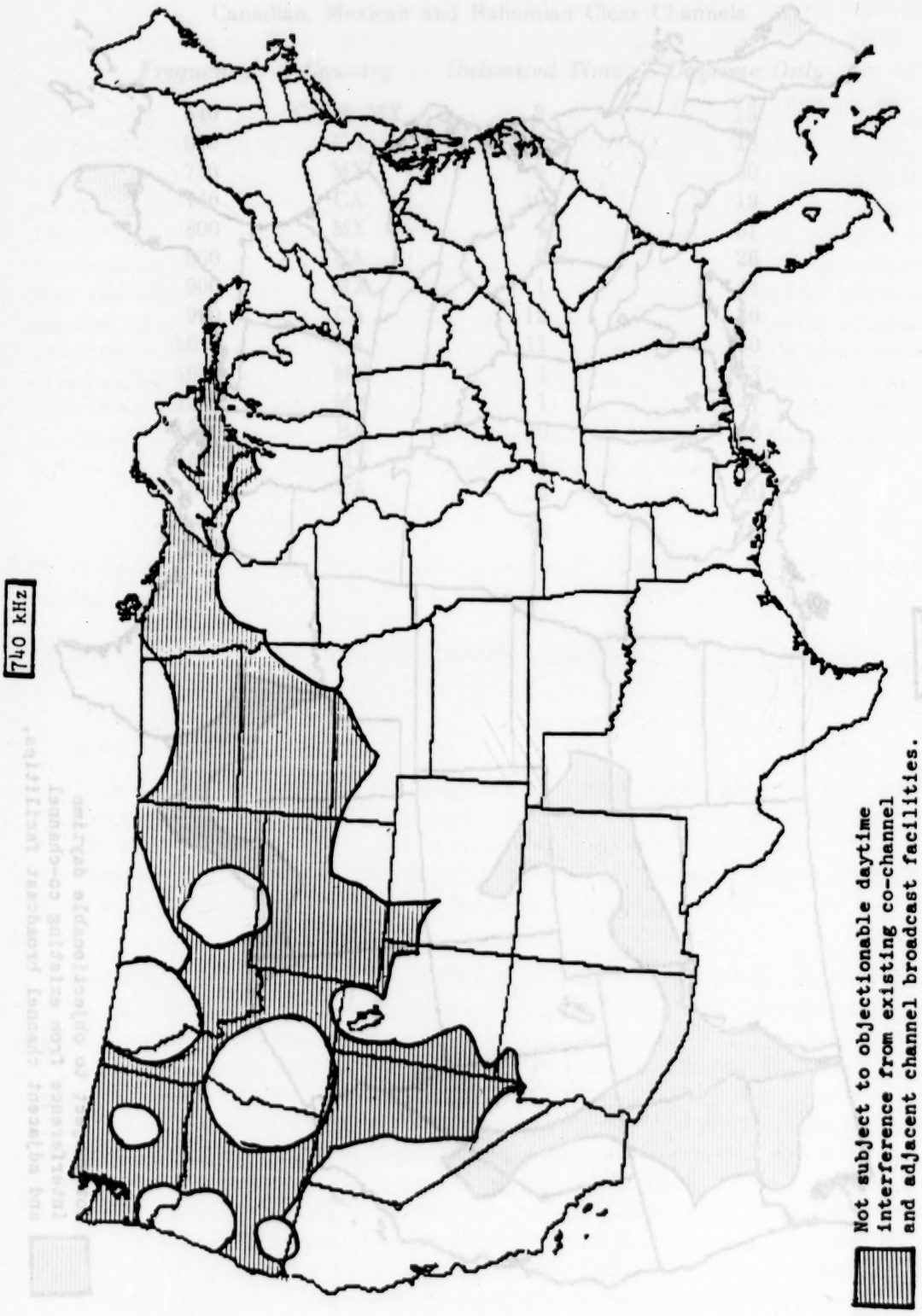
* * * * *

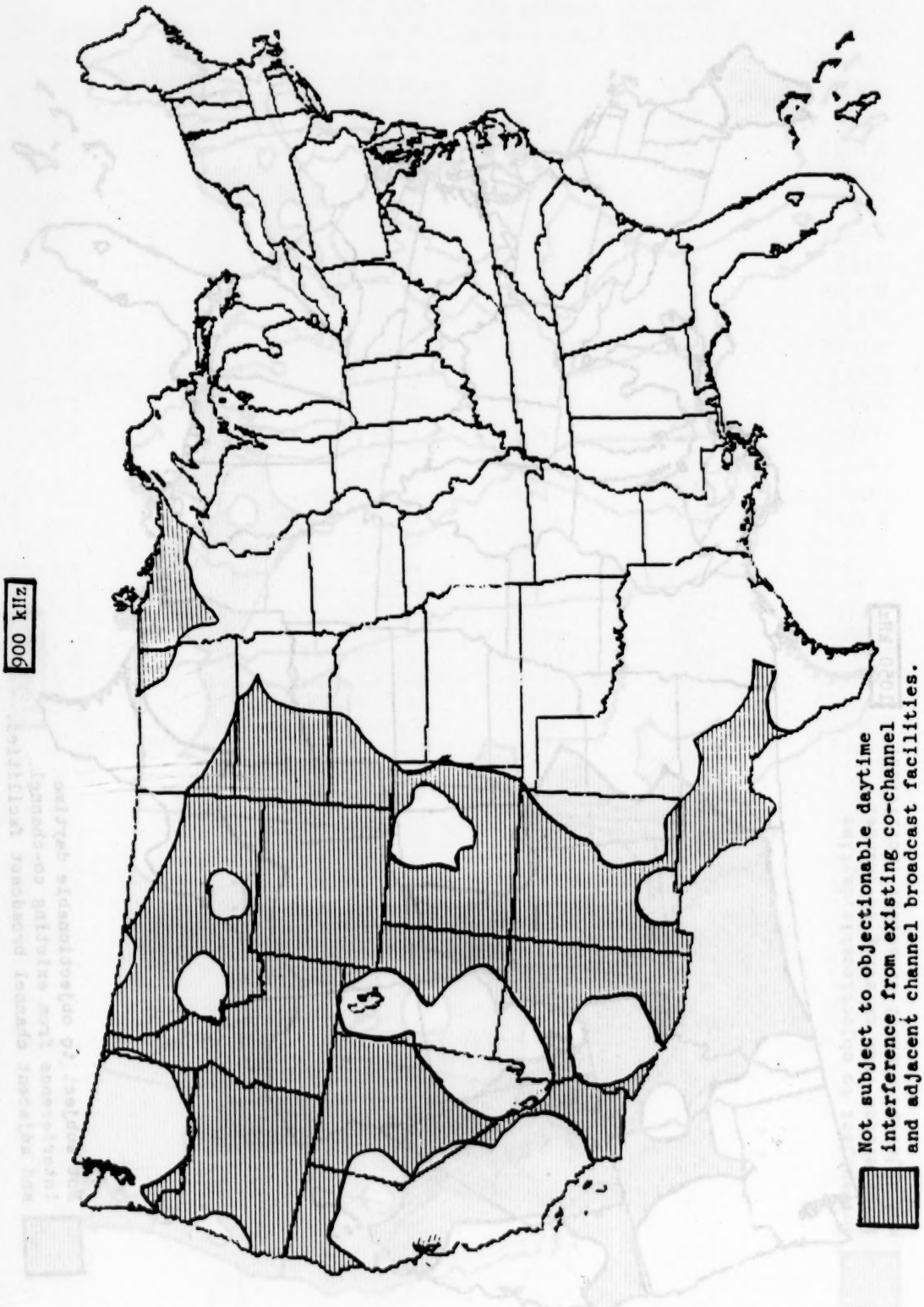
Appendix C

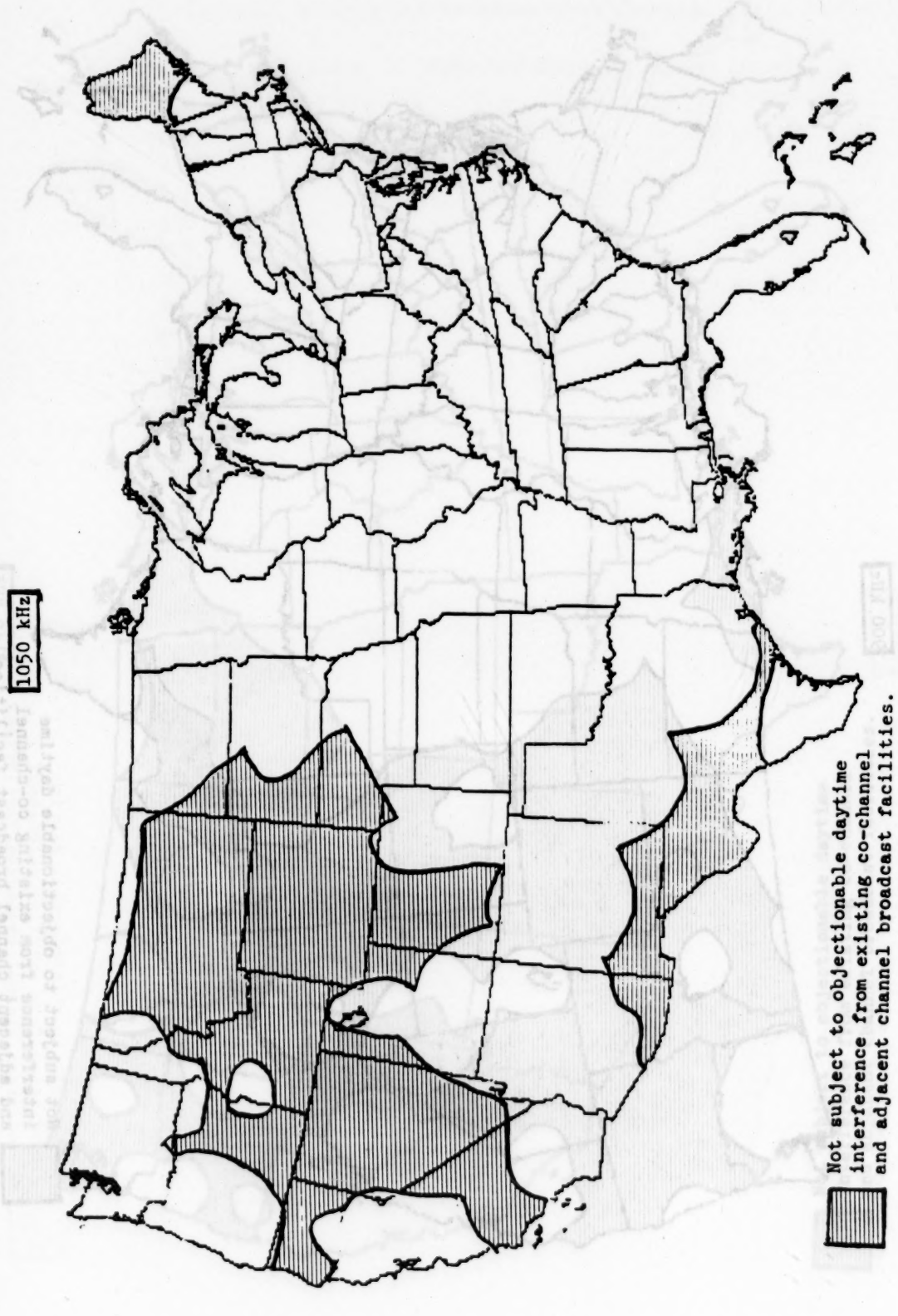
Domestic Assignments on
Canadian, Mexican and Bahamian Clear Channels

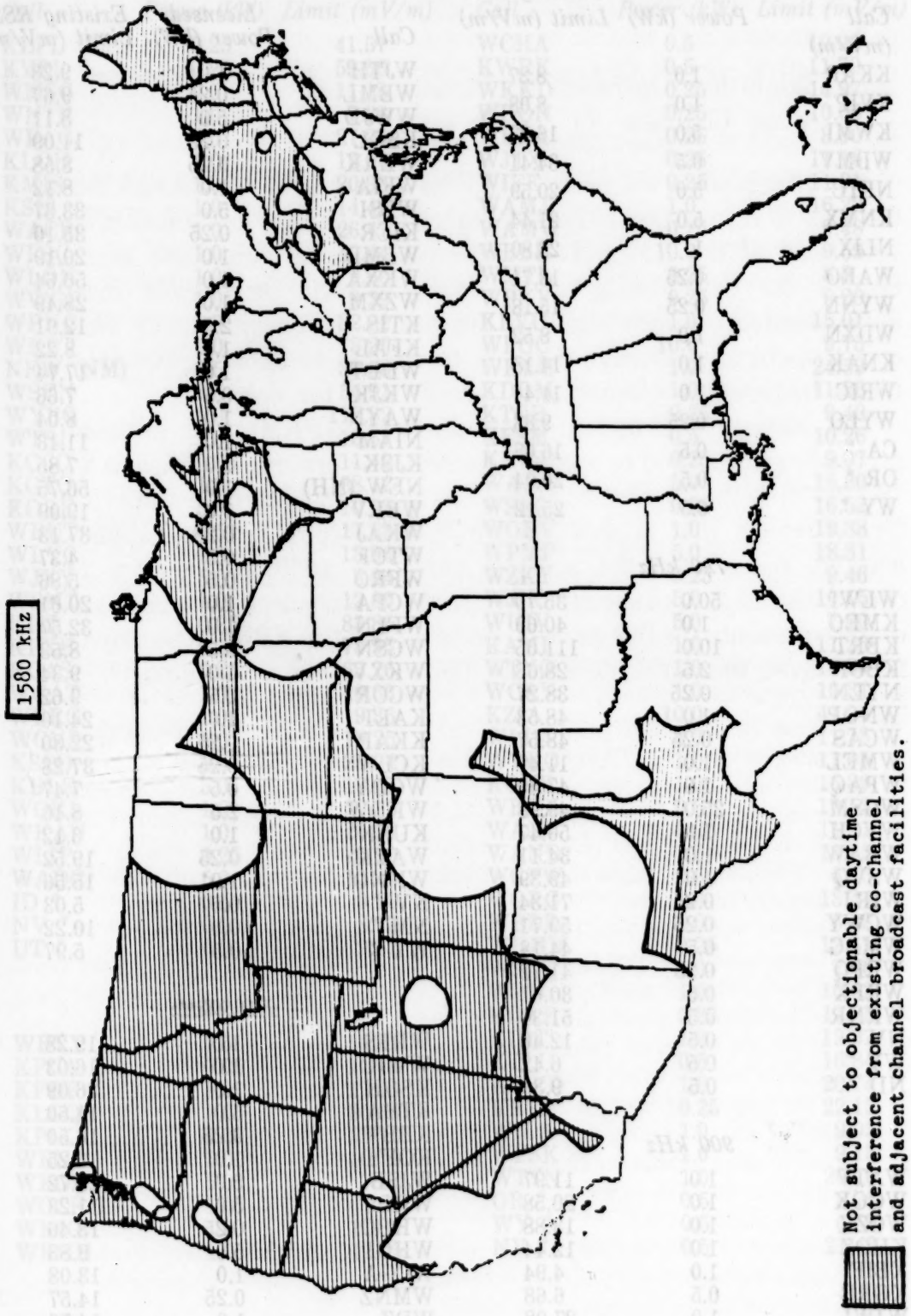
Frequency	*Country*	*Unlimited Time*	*Daytime Only*
540	CA & MX	3	13
690	CA	7	18
730	MX	0	30
740	CA	10	19
800	MX	1	31
860	CA	6	26
900	MX	1	44
990	CA	12	30
1010	CA	11	30
1050	MX	1	53
1220	MX	1	47
1540	BA	10	46
1570	MX	1	74
1580	CA	8	61
TOTAL		72	519


540 kHz
Not subject to objectionable daytime interference from existing co-channel and adjacent channel broadcast facilities.


740 kHz
Not subject to objectionable daytime interference from existing co-channel and adjacent channel broadcast facilities.


900 kHz
Not subject to objectionable daytime interference from existing co-channel and adjacent channel broadcast facilities.


1050 kHz
Not subject to objectionable daytime interference from existing co-channel and adjacent channel broadcast facilities.


1580 kHz
Not subject to objectionable daytime interference from existing co-channel and adjacent channel broadcast facilities.

0.5 KW NIGHTTIME OPERATION OF DAYTIME ONLY STATIONS

Call	*Licensed Power (kW)*	*Existing RSS Limit (mV/m)*
	540 kHz	
KKAR	1.0	8.37
KVIP	1.0	8.08
KWMI	5.0	16.33
WDMV	0.5	34.41
NETC	5.0	20.59
KNMX	5.0	21.44
NLIX	1.	28.80
WARO	0.25	13.71
WYNN	0.25	15.18
WDXN	1.0	8.52
KNAK	1.0	14.18
WRIC	1.0	11.44
WYLO	0.25	9.83
CA *	0.5	16.08
OR *	0.5	20.04
WY *	0.5	25.12
	740 kHz	
WLWI	50.0	35.70
KMEO	1.0	40.69
KBRT	10.0	111.65
KBOF	2.5	28.68
NYLN	0.25	38.27
WNOP	1.0	48.53
WCAS	0.25	48.57
WMEL	1.0	11.47
WPAQ	1.0	47.40
WGSM	25.0	49.98
WVCH	1.0	50.47
WBAW	1.0	34.11
WSVQ	1.0	49.39
WIRJ	0.25	71.34
WCWY	0.25	59.71
WMBG	0.5	44.18
WRPQ	0.25	41.72
WRPX	0.5	30.67
WRNR	0.5	51.30
NV *	0.5	12.46
WY *	0.5	6.42
ND *	0.5	9.39
	900 kHz	
WATV	1.0	11.97
WGOK	1.0	20.58
WOZK	1.0	13.88
KHOZ	1.0	12.44
KBIF	1.0	4.94
KGRB	0.5	6.68
WJWL	1.0	27.08
WSWN	1.0	11.01
WMOP	5.0	11.21

Call	*Licensed Power (kW)*	*Existing RSS Limit (mV/m)*
	900 kHz (continued)	
WJTH	1.0	9.23
WBML	0.25	9.67
WWJD	5.0	8.11
KSGL	0.25	11.09
WEAK	0.25	8.58
WFIA	1.0	8.12
WLSI	5.0	33.87
KICR	0.25	35.10
WLMD	1.0	20.19
WKXA	1.0	50.64
WZXM	1.0	28.49
KTIS	2.5	12.91
KFAL	1.0	8.22
WDDT	1.0	17.74
WKJK	0.5	7.66
WAYN	1.0	8.04
NIAM	1.0	11.13
KJSK	1.0	7.85
NEW (NH)	1.0	56.75
WBRV	1.0	19.09
WKAJ	0.25	37.13
WTOF	0.5	4.37
WFRO	0.5	5.86
WCPA	1.0	20.61
WFLN	1.0	32.57
WGSN	0.5	8.53
WKXV	1.0	9.34
WCOR	0.5	9.62
KALT	1.0	24.10
KKAP	0.25	22.30
KCLW	0.25	37.28
WODY	0.5	7.47
WKDW	2.5	8.10
KUEN	1.0	6.12
WATK	0.25	19.52
WNNO	1.0	15.56
NV *	0.5	5.03
NM *	0.5	10.22
WY *	0.5	5.97
	1050kHz	
WRFS	1.0	19.28
WWIC	1.0	16.03
KSOH	1.0	36.09
KTBA	5.0	11.50
KBBV	0.25	16.50
KOFY	1.0	5.25
WJSB	5.0	25.72
WROS	5.0	11.23
WHBO	0.25	13.46
WHGI	5.0	9.83
WCGA	1.0	13.08
WMNZ	0.25	14.57
WDZ	1.0	14.76
KBUF	0.25	29.59
WNES	1.0	11.33

* Hypothetical sites potentially useable at night in state indicated by two-letter state code.

1050 kHz (continued)

Call	*Licensed Power (kW)*	*Existing RSS Limit (mV/m)*
KLPL	0.25	41.57
KVPI	0.25	59.06
WMSG	0.5	11.18
WNTR	1.0	7.88
WPAG	5.0	27.28
KLOH	1.0	15.04
KMIS	1.0	20.93
KSIS	1.0	14.42
WACR	1.0	26.47
WFSC	1.0	10.44
WLON	1.0	9.60
WWGP	1.0	9.29
WBNC	1.0	82.62
WRBT	1.0	73.26
NEW (NM)	0.5	38.53
WSEN	2.5	54.91
WYBG	1.0	115.82
WTSJ	1.0	13.67
KCCO	0.25	11.40
KGTO	1.0	38.12
KORE	5.0	10.25
WBUT	0.5	17.28
WLYC	1.0	13.96
WJXY	5.0	8.04
WSMT	1.0	12.80
KIIZ	0.25	83.86
KPXE	0.25	78.95
KCAS	0.25	65.76
WGAT	1.0	10.83
WBRG	1.0	9.36
WCMS	5.0	10.25
KSPO	5.0	23.94
KBLE	5.0	16.47
WOKL	1.0	29.37
WKAU	1.0	26.34
WLIP	0.25	20.90
WADC	5.0	12.42
ID *	0.5	9.16
NV *	0.5	8.13
UT *	0.5	9.61

1580 kHz

WEYY	0.5	16.61
KPCA	0.25	10.49
KFDF	1.0	17.11
KLOQ	1.0	20.24
KPIK	5.0	21.76
WENO	5.0	10.72
WBGB	5.0	7.82
WCCF	1.0	7.38
WKIG	1.0	16.07
WKUN	1.0	12.05

1580 kHz (continued)

Call	*Licensed Power (kW)*	*Existing RSS Limit (mV/m)*
WCHA	0.5	12.96
KWRK	0.5	11.79
WKKD	0.25	14.97
WDON	0.25	10.05
WBBA	0.25	8.90
WJTX	0.25	11.16
WIFE	0.25	11.31
WAMJ	1.0	16.22
WAMW	0.25	9.48
WBBE	10.0	9.59
WMTL	0.25	8.8
WPKY	0.25	9.20
KLVU	1.0	15.01
WPGC	10.0	9.75
WKLH	1.0	24.59
KDOM	1.0	11.26
KTGR	0.25	9.42
KESM	0.5	10.26
KNIM	0.25	9.07
WAMY	5.0	15.30
WSLL	0.25	16.52
WORV	1.0	19.38
WPMP	5.0	18.31
WZKY	0.25	9.46
WJIK	5.0	10.15
WUIV	5.0	7.60
KAMI	1.0	11.26
WTYO	1.0	10.30
WCRV	1.0	10.31
KZIA	10.0	41.94
WLIM	5.0	11.78
WVKO	1.0	11.95
KOKB	1.0	16.89
WHEX	0.5	10.53
WAJE	0.25	11.21
WANB	1.0	10.75
WGFW	2.5	6.75
WORG	1.0	13.44
WBBR	5.0	6.48
WHHM	0.25	12.57
WSKT	1.0	7.76
WLIJ	1.0	10.62
KGAF	0.25	17.65
KIRT	1.0	19.97
KTLU	0.5	16.84
KWED	1.0	20.74
KBYP	0.25	22.15
WILA	1.0	9.05
WPSK	1.0	9.15
WTTN	1.0	20.16
OR *	0.5	5.76
WY *	0.5	6.60
NV *	0.5	21.43

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

RE: Nighttime Operation on Canadian, Mexican and Bahamian AM Clear Channels

Notwithstanding the positive aspects of this *Order*,[1] I dissent from the decision to reject use of the acceptance criteria now contained in Section 73.37(e)(2) of the Rules. The *Order* proposes no substitute acceptance criteria for determining which applicants will be eligible for these approximately 40 new stations. We are, thus, backing away from our commitment to encourage minority ownership and noncommercial use of these frequencies without *any* record basis for doing so.

The *Notice of Proposed Rule Making* (NPRM) that initiated this proceeding[2] proposed to apply the acceptance criteria specified in Section 73.37(e)(2) to the applications for these new unlimited time stations.[3] This *Order* rejects that approach, permitting acceptance of all applications without regard for the relative need for additional service to the community of license specified. While the *Order* purports to recite a basis in the comments for this drastic reversal from the NPRM, the majority, in fact, leaves the rationale for the *Order's* outcome unstated.[4]

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[1] I endorse the decision to provide relief to the 519 AM daytime-only broadcasters now operating on the foreign Clear Channels. I am also pleased with the Mass Media Bureau's initiative in developing a means of implementing this relief in a way that will minimize the paperwork burden on the affected licensees and bring this expanded nighttime service to the public quickly. These actions on behalf of daytimers contrast sharply with this *Order*'s insensitivity, niggardliness and lack of helpfulness with regard to the needs of the minority community.

[2] Docket No. 84-281, 49 Fed. Reg. 18567 (May 1, 1984).

[3] The Commission noted that "[i]t appears that the primary issues pertaining to the use of these foreign clear channels are some of the same issues that were addressed previously in the Commission's *Report and Order* in Docket No. 20642, *Clear Channel Broadcasting in the AM Broadcast Band, ...*" 49 Fed. Reg. 18567 (May 1, 1984), at para. 6. The Commission went on to say that: "Because of the relatively short time that has elapsed since the adoption of the 1980 *Report and Order*, we believe that resolution of issues reached in that proceeding can also be applied in this proceeding. In light of this, we propose to adopt identical or similar standards for new full-time Class II stations on the foreign Clear Channels as were adopted in Docket No. 20642." *Foreign Clear Channels, supra*, at paragraph 6.

[4] In paragraph 12 the *Order* seems to suggest that the decision to help daytimers somehow diminishes the opportunity this *Order* provides to help minorities. Addressing the need to provide nighttime authorizations for existing daytime-only stations is an objective the *Order* accomplishes admirably. I applaud this aspect of the *Order*. Nevertheless, since the relief we provide to the daytimers does not affect the availability of these channels for new unlimited time stations (*see Order* at paragraph 14) our concern for the daytimer's plight provides no justification of ignoring the even harsher plight of minorities. (Few

The *Order* vaguely refers to the absence of any reason "to funnel growth toward areas of greatest need."[5] However, no explanation is given of how the needs that Section 73.37(e)(2) was designed to address will be accomplished without any acceptance criteria[6] or how this decision not to supervise distribution of this spectrum complies with Section 307(b) of the Communications Act.[7]

The key to this riddle of the reversal without reasons is that Section 73.37(e) helps minorities (among others). For that reason,[8] the majority is unwilling to continue the existence of this rule section. It is reluctant to explain its movitation for rejecting Section 73.37(e)(2) because it would have an insurmountable task justifying that decision when the problem of underrepresentation of minorities in the broadcast industry is so far from being resolved.

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minorities even have daytime-only authorizations.) In fact, our willingness to use administrative resources (to do the engineering for the affected daytimers), modify the rules (e.g., by dropping the minimum power requirements) and create daytime preferences (*see, e.g., Second Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 15558 (April 19,1985)) demonstrates a willingness to favor existing broadcasters over minorities.

[5] *Order* at paragraph 13.

[6] Section 73.37(e)(2) provided for acceptance of unlimited time applications in already otherwise adequately served communities if the station proposes noncommercial service or the applicant is minority controlled. These provisions were adopted by the Commission in 1980 to ensure that some of the limited number of new stations available on the U.S. Clear Channels were used to address the needs identified by the Commission as the most pressing. *Clear Channel Broadcasting in AM Broadcasting Band*, 78 FCC 2d 1345, *recon. denied*, 83 FCC 2d 216 (1980). The number of new stations available on the foreign Clear Channels is one third of what was possible on the U.S. Clear Channels and the number of minority owned stations has not increased substantially since 1980. Therefore, the need for acceptance criteria addressing the needs of the minority community is even greater on the foreign Clear Channels.

[7] Section 370(b) of the Communications Act requires the Commission to make ". . . distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. Section 307(b). While this statutory requirement need not be read so strictly as to require the use of a particular acceptance criteria, it would be arbitrary for the Commission to allow depletion of this limited number of new station opportunities without even considering the applicability of this statutory provision.

[8] In the *NPRM* on deletion of Section 73.37(e)(2), the majority gave assurances it was not prejudging the outcome of this proceeding. (I questioned the veracity of this promise.) The majority should not, given these assurances that these proceedings were independent, claim that the rationale in the Section 73.37(e)(2) *NPRM* provides a basis for its action today. Since the rationale in Section 73.37(e)(2) *NPRM* provides no basis for its action and this *Order* provides no basis either, it is fair to say that the majority takes this action having a significant negative effect on minority participation in broadcasting without providing adequate explanation for its action.

Amateur Radio Service Operating Rules
Rebroadcasts
Rebroadcasts, Consent Required
Rebroadcasts, Prohibited

Report and Order adopted amending Parts 73 and 97 concerning broadcast use of transmissions of non-broadcast radio stations. These changes: 1) eliminate prohibition on rebroadcasts of messages transmitted by Personal Radio Service (CB and GMRS) stations; 2) revise and clarify Amateur Radio rules pertaining to broadcast-related activity; 3) permit rebroadcasts of CB and Amateur transmissions without prior permission of message originator; and 4) eliminate requirements for FCC rebroadcast permission and notification.
—*Amendment of Parts 73 and 97*
BC Docket No. 79-47

FCC 85-302

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the matter of	
Amendment of Parts 73 and 97 of the Commission's Rules Concerning Rebroadcasts of Transmissions of Non-broadcast Radio Stations	BC Docket No. 79-47 RM-2830

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 7, 1985; Released: June 13, 1985

BY THE COMMISSION:

1. The Commission is adopting revisions to its broadcast rules concerning rebroadcast of non-broadcast radio transmissions to eliminate unnecessary restrictions and administrative procedures and to conform them to new provisions of the Communications Act of 1934, as amended. These revisions provide for: 1) elimination of the prohibition on rebroad-

casts of Personal Radio Service communications[1]; 2) elimination of the requirement for FCC rebroadcast approval; and, 3) exemption of rebroadcasts of CB and amateur radio communications from the requirements for prior authorization from the originating station. The Commission also is revising portions of its amateur radio rules to clarify its intention to maintain the amateur service for purposes separate from broadcasting.

Background

2. This proceeding was initiated in 1979 in response to a petition for rule making filed by the National Association of Broadcasters (NAB). In its petition, the NAB asked the Commission to amend the rules to permit broadcast stations to rebroadcast CB emergency transmissions and to permit amateur stations to transmit emergency and public safety information for broadcast and broadcast-related purposes. On March 15, 1979, the Commission adopted a combined *Notice of Inquiry and Memorandum Opinion and Order* (*Inquiry*), 44 FR 20465, that denied the NAB's request for changes to the amateur rules, but asked for comments and additional information on the question of whether to permit rebroadcasts of CB emergency messages.

3. Subsequent to the *Inquiry*, in 1982, the Congress modified Section 605 of the Communications Act to eliminate the statutory proscriptions on the unauthorized interception of amateur and CB radio transmissions and radio communications related to certain distress situations.[2] In October of 1984, Congress again modified Section 605 and redesignated the new version as Section 705, 47 USC Section 705. However, the 1984 modifications do not affect matters relating to privacy or rebroadcasts of the subject radio communications.[3] An additional development concerning rebroadcast activity occurred in the context of the October 1983, United States military action in Grenada, when questions arose concerning use of amateur radio facilities in conjunction with broadcast news gathering activities.

4. In light of the record developed with respect to the *Inquiry*, the 1982 statutory revisions, and the uncertainty concerning the rules with respect to use of amateur communications in broadcast news gathering, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*), 49

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[1] The Personal Radio Services, as addressed in Part 95 of the rules, include the General Mobile Radio Service (GMRS), the Remote Control (R/C) Radio Service and the Citizens Band (CB) Radio Service. Prior to 1976, the Personal Radio Services were known as the Citizens Radio Service with subdivisions Class A, Class C, and Class D that corresponded to the individual subservices under the Personal Radio Services designation. *See, Third Report and Order* in Docket No. 20120, 41 FR 56067.

[2] *See* Communications Amendments Act of 1982, PL-97-259.

[3] *See*, Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §5, 98 Stat. 2779 (1984).

FR 30549, in the rebroadcast matter on July 12, 1984. In the *Notice*, the Commission indicated it was undertaking a comprehensive review and revision of its regulations with respect to rebroadcasts of transmissions of non-broadcast radio stations. The *Notice* set forth specific proposals for eliminating restrictions and procedures with respect to rebroadcast activity and for rewriting portions of the amateur rules to clarify the Commission's policy with respect to use of amateur facilities for broadcast purposes.

5. Thirteen comments and eight reply comments were submitted in response to the *Notice.* A list of parties filing comments and replies is presented in Appendix A.

6. *Current Rule Provisions.* Under the current rules, broadcast stations generally are permitted to rebroadcast the transmissions of non-broadcast radio stations, subject to requirements for prior permission that vary with the type of station originating the message.[4] The exception to this general policy is that the rules prohibit any rebroadcast of communications from Personal Radio Service stations, that is, stations in the CB and GMRS radio services.[5] In the case of private radio communications, the broadcaster is required to obtain rebroadcast permission from the originating station and the FCC. To rebroadcast communications of common carrier stations, the broadcaster must secure permission from the message originator in addition to the station licensee and the FCC. In either case, FCC approval may be requested informally by telephone, and must be followed with a written confirmation that includes the written consent of the parties associated with the originating station. Radio communications originated by stations owned and operated by the Federal Government may be rebroadcast with the permission of the originating government agency. FCC approval is not necessary for rebroadcasts of Federal Government radio transmissions, but the broadcaster is required to submit written notification that prior permission for the rebroadcast had been obtained. The rules for the Personal Radio Services prohibit use of CB and GMRS stations to convey program material for rebroadcast on a radio or television station.[6] However, the rules do permit these stations to be used for other purposes such as news gathering and administrative activities associated with program production.

7. The amateur rules specify that an amateur station may not be used to engage in any form of broadcasting, but do permit amateur operators to give consent to rebroadcast of their transmissions, provided that the transmissions do not contain any direct or indirect reference to the

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[4] The rebroadcast rules are set forth in 47 CFR 73.1207.

[5] *See* 47 CFR 73.1207(e). *See also* footnote 1, *supra.*

[6] *See* 47 CFR 95.181(i)(12) (GMRS rules), and 47 CFR 95.413(b)(CB rules).

rebroadcast.[7] Section 97.114 of the rules prohibits use of an amateur station for third party communications involving compensation or business activity.[8] Thus, the rules effectively preclude a broadcaster from any interactive use of amateur radio facilities.

Discussion

8. Upon review of the record in this proceeding, we have decided to adopt rule changes that are generally consistent with the proposals described in the *Notice.* These changes are largely deregulatory in nature and serve to facilitate greater opportunity for broadcasters to make use of non-broadcast radio communications.

9. As discussed in the *Notice*, the Commission is concerned with two separate and distinct policy objectives in the rebroadcast matter, each of which directly relates to statutory provisions in the Communications Act. The first is the requirement under Section 303 that the Commission classify radio stations and limit use of the frequencies assigned to the classes of stations to the purposes of the services to which they are allocated. The other is privacy and protection of communications from unauthorized use as provided in Section 705. The *Notice* discussed proposals for changes to the rules that serve both of these statutory provisions and also invited comment on any other issue that might arise in the context of this matter.

Revisions Pertaining to Section 303

10. Section 303 of the Communications Act directs the Commission to manage the use of the radio spectrum, and to do this in a manner that generally encourages the larger and more effective use of radio in the public interest.[9] With respect to use of the frequencies, Sections 303(a) and 303(b) provides that the Commission shall "[c]lassify radio stations" and "[p]rescribe the nature of the service to be rendered by each class of stations and each station within any class," 47 U.S.C. Sections 303(a)-(b). In order to assure the most effective use of the spectrum in terms of users and types of services in accordance with these statutory obligations, the Commission has found it necessary "to establish priorities, limit eligibility to hold radio station licenses, and restrict the use of stations to specified purposes and types of services which will be most beneficial to the public," *Citizen's Band Radio Rules*, 38 FCC 1238, 1241 (1965).

11. Consistent with Sections 303(a) and (b), the Commission's rules generally permit rebroadcasts of transmissions of stations in non-broadcast radio services, but prohibit the use of stations in services not allocated for broadcast purposes to transmit communications intended for

[7] *See* 47 CFR 97.113.

[8] *See* 47 CFR 97.114.

[9] *See* 47 U.S.C. Section 303.

broadcasting. This approach allows broadcast use of non-broadcast communications as a source of information and does not interfere with other services' normal authorized traffic and operation.

12. *Rebroadcasts of personal Radio Service Communications.* In the *Notice,* we proposed to eliminate the prohibition on rebroadcasts of Personal Radio Service transmissions in Section 73.1207(e) of the rules. We indicated that upon consideration of our basic policy towards rebroadcasting and the comments from the *Inquiry,* we believed this rule was no longer justifiable.

13. Section 73.1207(e) was added to the broadcast rules in an *Order* adopted November 12, 1975, 40 FR 54791.[10] The Commission stated that this action would conform the broadcast rules with the prohibitions in the Personal Radio Service rules on transmission of program material for a broadcast station and would address concerns that, due to congestion and other related considerations, the Personal Radio Services were impractical for use in conjunction with the broadcast services.[11] Thus, the decision that gave rise to the rule prohibiting rebroadcast of Personal Radio Service transmissions was intended to address situations in which CB and GMRS radio stations would be used to transmit broadcast program material. In the *Notice,* we observed that in prohibiting all rebroadcasts of Personal Radio Service communications the rule goes beyond the issue of use of such facilities for transmission of broadcast program material.

14. In the *Inquiry* and the *Notice,* the Commission also addressed an issue with respect to the possibility of rebroadcasts of false or misleading information that is often present in CB communications.[12] We were concerned that rebroadcasts of erroneous information could be harmful, especially when it pertains to emergency or public safety situations. Broadcast parties responding to the *Inquiry* submitted that this would not be a problem because stations could be expected to exercise the same discretion in rebroadcasting CB reports as they normally exercise in broadcasting information provided by the public through other means such as telephone, letter, or personal contact. The responses to the *Inquiry* did not resolve our concerns with respect to the quality of CB communications as a source of broadcast news. Nonetheless, we agreed

[10] Section 73.1207(e) was originally added as Section 73.1207(d).

[11] *See Order, supra,* at para. 2(h). The Commission indicated that there were "strong reasons" in addition to conformance for this rule: 1) the broadcast services are adequately served by remote pickup broadcast service facilities for remote transmissions of this type; 2) the [Personal Radio Services are] essentially designed to provide for private, short distance radio communications for business and personal use; and 3) congestion in the [Personal Radio Services] increases constantly making sole use of a channel beyond guarantee and therefore impractical for use in conjunction with the broadcast services."

[12] *See Notice,* paras. 12-13.

with the statements by the NAB and others that broadcasters are aware of their responsibilities to the public and can be expected to apply appropriate discretion in rebroadcasting intercepted CB messages. We further stated that we believe licensees are in a position to know their communities well enough to make individual determinations in such cases.[13]

15. The parties responding to the *Notice* generally agree with our initial finding. The National Radio Broadcasters Association (NRBA) submits that the benefits to be derived from rebroadcasts of Personal Radio Service communications far outweigh the potential for harm from transmission of inaccurate or useless information. CBS and NAB agree that to permit rebroadcasts of Personal Radio Service messages would not conflict with the intended purposes of these services and would provide increased access to sources of emergency traffic, road, and weather information. The only opposition to this proposal was expressed by the American Legal Foundation (ALF). It argues that to permit rebroadcasts of CB and GMRS messages would contradict the nature and purpose of these services by forcing station operators to curtail transmissions of private and personal information.

16. We find that the record supports our initial conclusion that rebroadcasts of CB or GMRS radio communications in the same manner as other non-broadcast radio services would not conflict with the purposes of the Personal Radio Services. We believe that the purposes of these services are adequately protected by the rules that prohibit use of CB and GMRS stations to convey broadcast program material.[14] We find no merit in the ALF's contention that rebroadcasts of CB and GMRS radio messages would lead station operators in these services to curtail transmissions of private or personal information. As discussed below, CB transmissions are not afforded statutory privacy protections, and GMRS transmissions are protected from unauthorized use by Section 705 of the Communications Act. In addition, we are sensitive to the First Amendment rights of broadcasters and do not wish to impose any regulation that might unnecessarily restrict broadcasters access to information resources. Therefore, we are eliminating the prohibition on rebroadcasts of Personal Radio Service communications.

17. *Revisions to the Amateur Rules.* In the *Notice*, we indicated that the staff regularly receives requests and inquiries with respect to use of amateur radio facilities for broadcast purposes, particularly news gathering in emergency situations. In view of these inquiries, we were concerned that the amateur rules might be insufficiently specific with respect to our intent that they prohibit all activities involving use of amateur stations for

[13] *Id.* para. 15.

[14] *See* footnote 6, *supra.*

broadcast purposes. We proposed to resolve this problem by rewriting the appropriate parts of the amateur rules and including a specific prohibition on the use of amateur stations for broadcast news gathering and other program production purposes.

18. The comments are generally supportive of this position, with one exception. The National Association of Broadcasters (NAB), the Radio-Television News Directors Association (RTNDA), and CBS, Inc., all support a broadcast news gathering exception for transmission of information concerning *bona fide* news events when other telecommunications facilities are unavailable or inadequate. The American Radio Relay League (ARRL) opposed such an exception as overly broad and inconsistent with the noncommercial nature of the amateur radio service. The ARRL took the position that only certain currently well-defined emergency uses of amateur transmissions should be excepted, and that no rule change is required.[15]

19. The ARRL also asserts that proposed Sections 97.113(b) and 73.1207 are inherently in conflict, arguing that a rule prohibiting use of an amateur station for broadcast program production or news gathering is not consistent with a rule allowing a broadcast station to retransmit an amateur signal. The ARRL argues that by definition any such broadcast station retransmission of an amateur signal would be for program production or news gathering purposes. The ARRL further states that prohibiting *all* retransmissions instead of just "automatic" retransmissions of non-amateur stations would adversely affect amateur operators. ARRL asserts that this would outlaw the practice of "manual" or non-automatic retransmission, i.e., where an amateur operator manually holds the microphone of the amateur transmitter up to a non-amateur receiver, such as an FM radio.

20. Upon consideration of the record, we are revising the amateur rules and including specific provisions to prohibit use of amateur stations for broadcast news gathering or production purposes as proposed. These rules will prohibit use of an amateur radio station as a remote pickup or auxiliary link broadcast service facility. Such uses of an amateur radio station as forwarding weather reports or providing commuter traffic reports for use in any broadcast context will continue to be expressly prohibited.

21. We proposed to remove emergency communications (current Section 97.91(a)) from the list of exceptions to the new 97.113 to anticipate and eliminate any possible construction that amateurs would be free to broadcast in an emergency. In light of objections to removal of an explicit authorization to engage in one-way emergency communications, we have

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[15] *See* the February 25, 1985 letter from the ARRL to the Chief, Special Services Division, Private Radio Bureau.

redefined amateur emergency communications to insure against any misinterpretation. Emergency communications are listed as an exception to the provisions of the new Section 97.113.

22. We note that a rule of reason applies when interpreting this emergency exception to the broadcast prohibitions in the amateur radio service. Thus, conveying news information directly relating to an unforeseen event which involves the safety of human life or the immediate protection of property falls within this rule of reason, if it cannot be transmitted by any means other than amateur radio because of the remote location of the originating transmission or because normal communications have been disrupted by earthquake, fire, flood, tornado, hurricane, severe storm or national emergency. In instances where other communication facilities were unavailable, RTNDA had sought a much broader application of amateur radio to broadcast purposes. In support of this proposition they cited only examples of necessary, emergency communications. We believe acceptable uses of amateur radio in emergencies are governed by traditional common sense interpretations of those provisions of current Section 97.91 which we are now including in Section 97.113. Therefore, our rule of reason approach described above accommodates RTNDA's expressed purposes without creating unnecessary exceptions to the amateur rules which could needlessly encourage unauthorized broadcast-related amateur transmissions.

3. With respect to the ARRL's claim that there is conflict in the rules, we point out that Section 97.113(b) does not restrict broadcasters from retransmitting amateur communications, but rather it prohibits amateur operators from transmitting messages for broadcast or broadcast-related purposes. This restriction on amateur transmissions is necessary to preserve the non-commercial nature of the amateur service. Section 73.1207 implements privacy protections under Section 705 of the Communications Act. It is not intended to insure that other radio services are used for their intended purposes. Sections 73.1207 and 97.113 serve different regulation objectives and are not contradictory.

24. In regard to the ARRL's comments concerning amateur retransmission of non-amateur radio communications, we have never construed the word "automatic" in Section 97.113 to legitimize the practice of holding an amateur microphone to a non-amateur receiver. In the case of retransmitting National Oceanic and Atmospheric Administration (NOAA) weather reports, used as an example by the ARRL, we note that the ARRL itself in its annotated publication of our rules states that the only ways to satisfy this rule are to write a script based on the weather report or to obtain it from a source other than a transmission (such as from a telephonic recording over the public switched telephone net-

work).[16] Thus removal of the word "automatic" clarifies this rule at a time when "automatic" has taken on new and different meanings in the context of amateur repeater, auxiliary and beacon usage.

25. *Revisions Pertaining To Section 705.* Section 705 prohibits unauthorized use of radio communications.[17] Prior to the 1982 revisions to the Communications Act, this statutory protection of privacy applied to virtually all radio transmissions except those intended for use by the general public.[18] The new Section 705 expressly excludes CB and amateur radio communications from the privacy protections. In enacting this provision, Congress recognized that "[a]ll amateur and CB radio operators may use any of the channels allocated to their services" and concluded "[t]hus, these operators do not enjoy any reasonable expectation of privacy . . . ."[19]

26. In accordance with the requirements of Section 705, the Commission's rules require broadcasters to obtain appropriate permissions prior to rebroadcast of non-broadcast radio transmissions.

27. *Permission from CB and Amateur Stations.* In view of the new statutory provisions, we proposed to exempt rebroadcasts of CB and

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[16] *See FCC Rule Book*, ARRL, 1984, at 6-6.

[17] The current Section 705 states, in relevant part, that:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . .
>
> No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.
>
> This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

Unauthorized rebroadcasts of broadcast signals are prohibited under a separate provision in Section 325(a) of the Communications Act. *See* 47 U.S.C. Section 325(a).

[18] The earlier version of the then Section 605 applied to all radio communications except for those which are "broadcast or transmitted by amateurs or others for use of the general public" or which relate to ships in distress. Under this version of the law, the matter of when an amateur communication is for the general public was clarified by a 1980 judicial interpretation that amateur communications other than calls for contact with another station were subject to the protection of Section 605, *Reston* v. *FCC*, 492 F. Supp. 697 (D.D.C. 1980).

[19] H.R. Rep. No. 765, 97*th* Cong. 2d Sess. (1982).

amateur transmissions from the requirements for prior authorization from the originating station. Broadcast interests support this proposal. In comments expressive of the consensus of the broadcast respondents, the NAB submits that elimination of the requirements for rebroadcast consent from CB and amateur operators would make available an important and often unique source of information and would not pose any reasonable concerns with respect to privacy. Amateur radio parties are opposed to elimination of the requirement for rebroadcast permission from amateur stations. The American Radio Relay League (League) argues that while an amateur station may not expect privacy in its transmissions, some case-by-case control over broadcast transmission of amateur signals is necessary to insure that the non-commercial nature of amateur radio is preserved. The League asks the Commission to retain the amateur consent provision and thereby place control over the use of amateur communications in the hands of those who have a direct interest in maintaining the character and integrity of the service. Comments from individual amateur licensees express concern for loss of privacy if the rebroadcast consent requirements are lifted.

28. After consideration of the record concerning this issue, we continue to believe that it is no longer necessary or desirable to require broadcasters to obtain rebroadcast consent from CB and amateur radio stations. We do not agree that the non-commercial nature of amateur radio will be jeopardized if this requirement is eliminated. In the absence of this rule, amateur operators will remain in full control of all communications transmitted on the amateur band. Broadcast use of amateur communications, with the exception of third party communications in emergency situations as discussed *supra*, will continue to be limited to secondary, or "receive only", purposes. Thus, we see no threat to the non-commercial nature of amateur radio if the consent requirement is eliminated. In addition, the legislative history of Public Law 97-259 clearly states that " . . . these operators do not enjoy any reasonable expectation of privacy . . . ."[20] Furthermore, we find no justification for maintaining privacy protections for CB and amateur transmissions as a matter of policy. Accordingly, we are exempting CB and amateur transmissions from the requirements for prior authorization from the originating station in Section 73.1207(c)(1).[21] With this change to the broadcast rules, the provision in Section 97.113 of the amateur rules that specifically allows amateurs to grant rebroadcast consent is no longer necessary. Therefore, we are deleting this provision from Section 97.113.

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[20] *See* Congressional Record—House, H6546 (August 19, 1982).

[21] We note that Congress did not exclude GMRS transmissions from the provisions of Section 705. Thus, the GMRS service is still protected and our rules will continue to require rebroadcast permission from stations in this service.

29. *FCC Rebroadcast Approval.* In the *Notice*, we proposed to eliminate the requirements for FCC approval to rebroadcast transmissions of private, non-broadcast radio stations and for written notification to the FCC that permission had been obtained prior to rebroadcast of transmissions of a government radio station. Our internal review of these rules revealed that FCC approval, whether informal (telephone) or formal (written) is routinely granted if the rebroadcast would otherwise be consistent with the rules. This review also indicated that the written notifications associated with rebroadcasts of government communications are simply associated with a station's records and do not form the basis for any subsequent regulatory or administrative activity.

30. In the *Notice*, we indicated that in the absence of the requirements for FCC approval and notification, we would consider alternative regulation to insure and verify compliance with the consent requirements of Section 705. We proposed to require licenses to obtain written rebroadcast permission from the originating station in all cases where Section 705 applies, and to maintain a copy of that permission at the station, to be available to the FCC on request. The written permission would be maintained until final FCC action on the station's license renewal subsequent to the rebroadcast or for one year, which ever is longer. We also asked for suggestions for an approach that would provide for "implied consent."

31. The commenting parties unanimously support our initial conclusion that the requirements for FCC approval and notification with respect to rebroadcasts of non-broadcast radio transmissions serve no useful regulatory purpose. CBS generally opposes any new rules to insure compliance and verification with respect to rebroadcast consent. It contends that such requirements are unnecessary given the criminal penalties for violation of Section 705 and the remedies available to private parties through civil litigation. CBS submits that in view of these penalties, broadcasters have strong incentives to take whatever steps are necessary to insure that rebroadcast consent is obtained and to maintain adequate records to document that consent. As an alternative to our initial proposal, it suggests a rule that would permit broadcasters to rely on informal, express verbal approval which would be followed by a written document prepared by either the message originator or the broadcast station. The NAB also believes that the best approach would be simply to defer to the provisions of Sections 705. The NAB submits that it is hesitant to support an implied consent policy in the case of police, fire, and other public safety communications. However, it suggests that such an approach might be feasible with respect to other private radio communications and that implied consent could be determined from the nature and content of the transmissions.

32. After consideration of the record, we conclude that the requirements for FCC rebroadcast approval and notification serve no useful regulatory purpose. Accordingly, we are eliminating them. This action will remove unnecessary regulatory procedures and relieves both broadcast licensees and the Commission of the burden of complying thereto.

33. We agree with CBS and the NAB that additional requirements to insure compliance and verification with respect to rebroadcast consent under Section 705 are unnecessary. We conclude that our own provisions for rule violations,[22] and the civil and criminal penalties CBS mentions provide sufficient incentive to insure that broadcasters comply with the rebroadcast consent requirements and that they maintain adequate documentation to verify that consent was obtained. Accordingly, we will not set forth rules requiring licensees to maintain written verification of rebroadcast consent. We also conclude that an implied consent approach would be difficult to make workable within the context of Section 705 and, therefore, we will not adopt such an approach.

34. *Foreign Satellites.* The Turner Broadcasting System requests that the Commission issue an interpretation to the effect that it would not violate Section 705 to rebroadcast brief excerpts of programming obtained from foreign satellites, without FCC approval, but with the consent of the signal originator. Turner also contends that such an interpretation would also be consistent with other interests such as copyright, privacy, and the INTELSAT Agreement that are protected in the U.S. through enforcement of Section 705. In reply comments, the Communications Satellite Corporation (COMSAT) argues that Turner's request should be denied on the grounds that it introduces questions with respect to United States treaty obligations and other national and foreign policy interests related to international satellite transmissions and thus goes beyond the issues that led to the *Notice.* COMSAT also contends that Turner's request is inconsistent with the approach the Commission has taken to date with respect to blanket authority to intercept foreign satellites and therefore should be denied on its merits.

35. We find that the issues with respect to United States treaty obligations and international agreements raised in Turner's request are beyond the scope of this proceeding. Accordingly, we are not ruling on Turner's request to the extent that it involves permission to receive and use excerpts of foreign satellite programming on a routine basis. We wish to indicate that we are not taking a position on the merits of this aspect of Turner's request. However, we note that once a licensee has obtained clear authority from the Commission to receive and use foreign satellite programming, there is no bar to rebroadcasting such programming. In this context, we note the Common Carrier Bureau recently issued a

[22] *See* Section 1.80 of the Commission's rules.

Memorandum, Opinion, and Authorization (File No. 907-DSE-L-85, action May 17, 1985 by the Chief, Common Carrier Bureau) concerning an application by the Cable News Network, Inc. (CNN), a Turner affiliated company. That action issued a "conditional grant" to CNN to receive signals from the Soviet Union's GHORIZONT STATIONS 4 and 7 satellites. Under the new rules adopted herein, CNN may rebroadcast programming from these satellites without further approval from the FCC.

Procedural Matters

36. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final regulatory flexibility analysis is:

I. Need for and Purpose of the Rules:

The Commission has determined that portions of its rules pertaining to rebroadcasts of non-broadcast radio communications impose unnecessary restrictions and administrative procedures on radio service licensees and the Commission and, therefore, has eliminated those provisions of the rebroadcast rules. These changes will provide increased opportunities for commercial broadcasters to use non-broadcast radio communications in news and other programming. We have rewritten the amateur rules that address use of amateur facilities for broadcast purposes to clarify our general policy prohibiting such uses and to include an exception to permit third party communications on behalf of broadcasters over amateur stations in emergency situations. We believe the public interest benefits in news and information dissemination that can be obtained by permitting third party broadcast traffic in emergencies are sufficient to outweigh the concerns of our general policy of prohibiting such uses of amateur stations. This action also implements certain provisions of the Communications Amendments Act of 1982.

II. Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result:

A. *Issues raised:* No issues or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment:* The Commission considers the absence of comments discussing adverse impact with respect to its proposals to relax the rules for rebroadcasts of non-broadcast radio communications and to rewrite the amateur rules that pertain to use of an amateur station for broadcast purposes to be indicative of their lack of potential for negative or harmful effects on small business entities. We believe the new rebroadcast rules will have a positive effect on broadcast stations by providing increased

and easier access to information that is available through non-broadcast radio services.

C. *Changes made as a result of such comments:* None.

III. Significant alternatives considered and rejected:

With respect to the proposal to eliminate the prohibition on rebroadcasts of Personal Radio Service communications, the alternative was to retain the current rule. The Commission found that this restriction on use of CB and GMRS radio transmissions is no longer justifiable.

The Commission proposed to rewrite portions of the amateur rules to clarify its intent to maintain the amateur service for purposes separate and distinct from broadcasting. The alternative was to adopt some form exception that would permit limited third party amateur communications for broadcasters. The Commission agreed with the arguments in the comments that it would serve the public interest to permit limited third party amateur communications for broadcasters and therefore adopted a version of the alternative approach with respect to this issue.

The alternative to the proposal to exempt CB and amateur communications from the requirement to obtain consent from the originating station prior to rebroadcast was to continue to require such consent. In view of the revised Section 705 of the Communications Act, we found it unnecessary to require broadcasters to obtain rebroadcast permission from CB and amateur operators.

The final proposal was to eliminate the requirements that stations: 1) obtain FCC approval prior to rebroadcast of private, non-broadcast radio communications and, 2) notify the FCC that prior consent had been obtained in cases of rebroadcasts of communications of government owned radio stations. Instead of these requirements, the Commission proposed merely to require licensees to obtain a copy of written permission from the message originator, to be available on request. The alternatives were: 1) require only informal, verbal permission from the message originator, 2) not specify requirements for verification, and 3) maintain the current requirements for permission. The Commission determined that in view of the criminal and civil penalties for violation of Section 705, specific rules to insure compliance and verification of compliance with the statutory consent requirements are not necessary. The Commission therefore eliminated the provisions in its rules requiring separate FCC approval and notification in cases where non-broadcast radio communications are rebroadcast.

37. Authority for adoption of the rules set forth herein is provided in Sections 2, 4(i), 303, and 705 of the Communications Amendments Act of 1934, as amended.

38. Accordingly, IT IS ORDERED that Parts 73 and 76 of the Commission's rules ARE AMENDED as set forth in Appendix B, effective July 22, 1985. In addition, IT IS ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A—may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

APPENDIX B

Parts 73 and 97 of Title 47 of the Code of Federal Regulation is amended as follows:

A. Part 73 - Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

Authority: Secs. 4 and 303, 48 Stat. 1066, as amended; 47 U.S.C. 154, 303. Interpret or apply Secs. 301, 307, 48 Stat. 1081, 1082, as amended, 1083 as amended, 47 U.S.C. 301, 303, 307. Other statutory and executive order provisions authorizing or interpreted or applied by specific sections are cited to text.

2. Section 73.1207 is amended by revising paragraph (c) to read as follows:

§73.1207 Rebroadcasts.

* * * * *

(c) The transmissions of non-broadcast stations may be rebroadcast under the following conditions:

(1) Messages originated by privately-owned non-broadcast stations other than those in the Amateur and Citizens Band (CB) Radio Services may be broadcast only upon receipt of prior permission from the non-broadcast licensee. Additionally, messages transmitted by common carrier stations may be rebroadcast only upon prior permission of the originator of the message as well as the station licensee.

(2) Except as provided in paragraph (d) of this section, messages originated entirely by non-broadcast stations owned and operated by the Federal Government may be rebroadcast only upon receipt of prior permission from the government agency originating the messages.

(3) Messages originated by stations in the amateur and Citizens Band (CB) radio services may be rebroadcast at the discretion of broadcast station licensees.

3. In Section 73.1207, paragraph (e) is removed.

B. Part 97 - Amateur Radio Services

1. The authority citation for Part 97 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609.

2. Paragraph (w) of Section 97.3 is revised to read as follows:

§97.3 Definitions.

* * * * *

(w) *Emergency communication.*

A non-directed request for help or a distress signal directly relating to the immediate safety of human life or the immediate protection of property.

* * * * *

3. Paragraph (d) of Section 97.85 is revised to read as follows:

§97.85 Repeater operation.

* * * * *

(d) A station in repeater operation shall be operated in a manner insuring that it is not used for broadcasting (see §97.113).

* * * * *

4. Section 97.91 is removed and reserved.

5. Section 97.110 is revised to read as follows:

§97.110 Business communications prohibited.

The transmission of business communications by an amateur radio station is prohibited except for emergency communications (see §97.3(w)).

6. Section 97.113 is revised to read as follows:

§97.113 Broadcasting and broadcast related activities prohibited.

(a) An amateur station shall not be used to engage in any form of broadcasting, that is, the dissemination of radio communications intended to be received by the public directly or by intermediary relay stations.

(b) An amateur station may not be used for any activity related to program production or news gathering for broadcast purposes.

(c) An amateur station shall not retransmit programs or signals emanating from any class of radio station other than amateur, except for emergency communications (see §97.3(w)).

(d) The following one-way amateur transmissions are not considered broadcasting:

(1) beacon or radio control operation;

(2) information bulletins consisting solely of subject matter relating to amateur radio;

(3) transmissions intended for persons learning or improving proficiency in the international Morse code; and

(4) emergency communications (see §97.3(w)).

(e) Round table discussions or net operations where more than two amateur stations are in communication with one another are not considered broadcasting.

Instructional Television Fixed Service
Licensee, Qualifications

Only local entities will be considered for ITFS licenses until October 1, 1987. All licensees must be accredited or must serve accredited schools. All licensees not serving their own inschool needs must have the support of their proposed receive sites evidenced by letters demonstrating intended use of the service. Nonlocal licensees will also be required to establish local program selection committees.
—*Amendment of Part 74*
MM Docket No. 83-523

Cut-Off Rules
Instructional Television Fixed Service

ITFS will use traditional "A/B" cut-off lists to establish deadlines for competing applications and petitions to deny. This procedure is more appropriate than a "window" cut-off procedure, given the nature of the applicants and the nature of the service. The "A" cut-off list will provide 60 days to file mutually exclusive applications, major amendments, and petitions to deny. A subsequent "B" list will provide 30 days for petitions to deny and minor amendments.
—*Amendment of Part 74*
MM Docket No. 83-523

Instructional Television Fixed Service
Mutual Exclusivity

The Commission will employ a point accumulation method with random selection between equally qualified applicants for choosing among mutually exclusive applications. The most points will be awarded for local applicants and for applicants which are accredited. Points will also be awarded for applicants which comply with the 4-channel limitation, which serve new categories of students, and which are E or F channel group licensees which can demonstrate a need for expansion.
—*Amendment of Part 74*
MM Docket No. 83-523

Engineering Standards
Instructional Fixed Television Service

Cochannel and adjacent channel protection ratio of 45 dB and 0 dB, respectively, are adopted to form a quantifiable framework for adjudication of interference disputes. Applications will be required to include a 50-mile radius engineering analysis. Characteristics of a 2-

foot parabolic receive antenna will be used for interference studies. A 15-mile radius protected service area is rejected.
—*Amendment of Part 74*
MM Docket No. 83-523

FCC 85-294

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Part 74 of the Commission's Rules and Regulations In Regard to the Instructional Television Fixed Service	MM Docket No. 83-523

SECOND REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 31, 1985; Released: June 20, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

1. The Commission has before it comments filed in response to its *Notice of Proposed Rulemaking* in MM Docket No. 83-523 (*"Notice (85-523)"*), 48 Fed. Reg. 29553 (June 27, 1983), and its *Further Notice of Proposed Rulemaking* in MM Docket No. 83-523 (*"Further Notice (83-523)"*), 98 FCC 2d 1249 (1984).[1] This Report and Order considers those comments and adopts rules governing the application and comparative selection processes for, and the provision of service by, licensees in the Instructional Television Fixed Service ("ITFS"), and concludes this proceeding.

Introduction

2. Section 74.931 of the Commission's Rules states:

> Instructional television fixed stations are intended primarily to provide a means for the transmission of instructional and cultural material ... to specified receiving locations for the primary purpose of providing a formal educational and cultural development to students enrolled in accredited public and private schools, colleges and universities.... Such stations may also be used for ... in-service training ... extension of professional training ... administrative activities ... and other similar

[1] A list of the parties filing comments in response to *Further Notice (83-532), supra,* is attached as Appendix A.

> uses.... Stations may be licensed in this service as originating or relay stations to interconnect [ITFS] stations in adjacent areas [or deliver and obtain instructional and educational material]. (47 C.F.R. §74.931(a)-(d).)
>
> *Notice (83-523), supra,* had proposed the relaxation of certain ITFS technical and nontechnical requirements, premised, in part, on the fact that channels allocated for ITFS were vastly underutilized. *Id.* at 29554-55. This was found to be the result of the specialized nature of ITFS and the limited funds available for its growth. *Id.* On the same day, the Commission adopted a *Report and Order* in General Docket No. 80-112 (*"Report and Order (80-112)"*), 94 FCC 2d 1203 (1983), which permitted ITFS licensees to use their excess channel capacity for non-ITFS purposes, either by themselves or by leasing to other parties. The growth and development of the educational and instructional services for which ITFS was designed were viewed as desirable goals and the Commission determined that permitting the leasing or commercial use of excess channel capacity and removing unnecessary and burdensome requirements would foster these goals.

3. Subsequently, in *Report and Order* in MM Docket 83-523 (*"Report and Order (83-523)"*), 98 FCC 2d 925 (1984),[2] the Commission adopted several of the changes proposed in *Notice (83-523), supra,* relaxing ITFS transmission standards, authorizing "temporary fixed stations" and program delivery to cable headends, encouraging frequency coordination, authorizing a one-step licensing procedure and increasing the ITFS license term from five years to ten years. At the same time, in *Further Notice (83-523), supra,* the Commission noted a significant increase in the number of applications filed for new ITFS facilities since its previous actions, primarily by nonlocal, nonprofit organizations. It stated that this increased interest in the ITFS spectrum was clearly a result of the decision to permit the use of ITFS excess channel capacity for commercial purposes, as most of the applications proposed, under varying circumstances, to lease channel time to operators in the Multipoint Distribution Service ("MDS"). It continued that the increased usage of the ITFS spectrum is desirable and encouraged, and reiterated its position that this goal and the means for its realization are meritorious and that the improved utilization of ITFS transmission time would foster a broader and more efficient use of spectrum capacity while generating new revenue sources for the development of ITFS. It observed that existing ITFS rules and policies were not adequate or inclusive enough to deal realistically with the rapidly changing developments in this area. It concluded that further consideration of certain aspects of the use of channel capacity for non-ITFS purposes, and other matters relating to ITFS generally, was necessary to assure the preservation of the ITFS service. Therefore, the Commission solicited comments on matters dealing with the following: eligibility requirements for becoming an ITFS licensee; selection procedures and criteria for choosing among mutually exclusive applicants;

[2] *Aff'd., Memorandum Opinion and Order* in MM Docket No. 83-523, FCC 85-111, released January 15, 1985.

procedural standards for "cutting off" applications that are accepted for filing; control of an ITFS facility by a licensee that leases excess channel capacity to others; the nature and scope of permissible ITFS service; and interference protection standards.

4. Comments were filed by numerous interested parties, most of them existing or prospective ITFS licensees. They claim that widespread recognition of the value of ITFS service has just begun and that the recent surge in applications will continue, expanding the number and variety of services provided. Commentors were unanimous on the critical importance of emphasizing appropriate eligibility criteria to preserve the essentially educational nature of ITFS service. An overwhelming consensus was expressed on the critical role that local involvement plays in effectively serving the intended ITFS audience.

5. As demand for ITFS facilities increases, careful choices must be made among competing interests. Embracing these fundamental principles, the actions taken herein will formulate rules which will focus on the qualifications of ITFS licensees as the basic means of directing the use of the service. Local applicants will be encouraged and preferred, but maximum advantage will be taken of the particular benefits offered by the participation of nonlocal applicants and national programming networks within the service. By this approach, the advantageous use of ITFS channels will be advanced to the greatest extent possible, without infringing on licensee discretion or discouraging cooperative involvement by lessees of excess channel capacity where the public will benefit from that cooperation.

6. To this end, specific provisions are adopted to: provide a "local priority period" during which time only local applicants will be considered for ITFS channels; maintain the "cut-off" status of nonlocal applicants whose requested channels are not authorized to local applicants during the local priority period; provide a point accumulation method with a random chance tie-breaker for selecting among mutually exclusive applications, with criteria including, among others, whether the applicant is local, whether it is an accredited school or governing agency, whether it would remain within the four-channel limitation, and factors contributing to the effective utilization of the resources for ITFS service, including the amount and kind of ITFS service proposed; provide an "A list, B list" procedure for cutting off mutually exclusive applications and petitions to deny, with a sixty-day "A" period; require that each ITFS channel carry formal education for credit to enrolled students, and include exclusively off-campus instructional programming; require a "substantial use" of at least twenty hours per week for all ITFS programming (with a total dedication of forty schedule hours per week for ITFS, either by reservation or recapture provisions) before designating excess capacity on a

channel for non-ITFS use. A one-channel reservation for national networks is rejected, and specific provisions to ensure that ITFS licensees retain control of their facilities in leasing situations are not adopted at this time. Technical standards are also expanded to include cochannel and adjacent channel protection ratios for use when agreement cannot be reached between parties; to specify a fifty-mile radius engineering analysis; and to specify a two-foot parabolic receive antenna's characteristics for reference in application processing, in certain situations. Also, the direct heterodyne frequency conversion requirement is deleted and a fifteen-mile radius protected service area is not adopted.

Eligibility

7. Under current rules, to be eligible for an ITFS license a party must be a school or governmental organization engaged in the formal education of enrolled students (*e.g.*, a school board or district), or a nonprofit organization formed for the purpose of providing instructional television materials to these entities.[3] In *Further Notice (83-523), supra,* the Commission reiterated that nonprofit educational organizations, including unaccredited organizations, should not be precluded from ITFS eligibility. It acknowledged the difficulty of applying eligibility standards to the new, nonlocal educational organizations, especially those backed by MDS operators, not doubting that those organizations were generally founded for educational purposes, but concerned that most have no local presence and that many of their proposals were not tailored to the numerous individual communities in which they applied. *Id.* at para. 16. The Commission was optimistic nonetheless that national networks could benefit the ITFS service, with their ability to achieve economies of scale and exchange programming nationwide, complementing local offerings and introducing service to unserved and underserved areas. Consequently, it expressed an inclination not to exclude such applicants from eligibility solely on the basis that they lack physical presence in the cities they proposed to serve, if they are otherwise qualified. At the same time it stressed the importance of a licensee's educational nature and its local involvement, and invited comments on what indicia of local involvement national entities could show to prove themselves eligible for a license. In particular, it asked whether a nonlocal applicant should obtain letters from its intended receive sites giving reasonable assurance of their intention to use the applicant's proposed service. *Id.* at paras. 18 and 19. It also inquired into the possibility of requiring local involvement through local selection and development committees, but indicated a preference to

[3] 47 C.F.R. §74.932(a). A nonprofit organization which would be eligible for a noncommercial educational television broadcast station is also considered to be eligible for a license for an ITFS station. *Id.*

let applicants present evidence of local involvement in whatever form they deemed most suitable to meet local educational needs. *Id.* Lastly, it asked whether local educational organizations, as opposed to local educational institutions, should be subject to any of the same eligibility criteria adopted for nonlocal applicants.

8. The vast majority of commentors believe that a local presence should be an absolute condition of eligibility. One group of commentors characteristically observes: "Education is inherently a local undertaking." Some commentors further insist that no local advisory committee could substitute for local physical presence. Local curriculum development, instructor involvement, and student assistance and feed-back are all essential and cannot be provided successfully except by "local institutions with substantial experience." Any organization from diploma mills to art galleries to day care centers could call itself "educational," insists one group, but only local bodies such as school districts and state educational agencies can decide what is truly educational; only they are entrusted with the state's particular academic standards. They assert that when the original 1963 rules expanded eligibility to include "nonprofit organizations," the intent was to enfranchise educational "community groups," not just any nonprofit entity.[4]

9. Several parties assert that if the Commission ignores these local guidelines, it will encounter an imbroglio of hearings and content regulation which would be both inappropriate and wasteful. It is better, they say, to set strict eligibility standards; then other restrictions such as the permissible use rules could be relaxed. The nonlocal applicants applying nationwide ("national applicants"), they imply, are not community groups because they are national organizations, and they are not even educational because, as one puts it, their "primary purpose ... is the commercial exploitation of ITFS." (Various comments filed by Cohn & Marks.)

10. One national applicant, Network for Instructional Television (NITV), also inveighed against the dangers of nonlocalism. It, however, would permit national entities with "strong local presence," including the establishment of local programming committees. The rest, it said, should be declared ineligible. The Instructional Telecommunications Foundation (ITF), the National Association of Public Television Stations, the University of Maryland and a few others also contend that the national applicants with sufficient local ties could promote diversity, competition, and innovation in the industry. Various proposals indicate that local selection and production committees might include representatives from the receive sites being served and a local office and staff. They might also perform surveys and select, produce, and schedule programming that meets

[4] Commentors cite *Report and Order* in Docket No. 14744, 39 FCC 846, 853-54 (1963).

specific local needs and does not duplicate other local programming sources. Only NITV proposes that a specific percentage (two-thirds) of each committee should consist of local representatives.

11. The Hispanic Information and Telecommunications Network (HITN), the League of Unified Latin American Citizens, and the Puerto Rican Legal Defense and Education Fund believe the emphasis on localism is misplaced. They believe that the unserved educational needs of Hispanics, which they allege are particularly critical, can best be met by Hispanic applicants, whether locally based or not.

12. Another group of commentors would allow nonlocal applicants, but require them to submit, among other things, a certificate of accreditation from the state department of education where it is located. This would ensure that the nonlocal applicant is "bona fide and accountable," that it would provide formal education, and that the quality of formal education would meet the given state's academic standards. For the same reason, some commentors from this group further urge that the applicant should also obtain state "authorization" in every state where it applies. They claim that this opinion is endorsed by the Council on Post Secondary Accreditation and the State Higher Education Executive Officers Association which together "represent the entirety of the accrediting and state authorizing communities." (Group comments filed by Dow, Lohnes, and Albertson, pages 29-31). Hospital associations oppose the accreditation requirement because some worthy providers of education, like hospitals, are not accredited. NITV and HITN contend that accreditation is no guarantee of motive or ability.

13. Several parties believe that letters of reasonable assurance that the applicant's service will be used by proposed receive sites should also be a factor in deciding the eligibility of nonlocal applicants. Letters are needed, a number of commentors explain, to show that the applicant has the school's genuine "active support."

14. Several other eligibility criteria were suggested, but less widely endorsed. A few commentors propose that a nonschool applicant should demonstrate its history of service to the given community, as the best indication of "future effective utilization." NITV and HITN counter that "prior local service" is no measure of an applicant's present or future ability to serve, and that such a requirement would preclude newly formed educational organizations. One small group asked for a general showing of educational experience. Some would make this a mandatory requirement in combination with accreditation and other factors. Others would accept a showing of educational experience in the place of accreditation, since it would show the applicant is "genuinely instructional."

Discussion

15. Qualification criteria for ITFS licensees are the crucial points in any mechanism designed to promote the effective exploitation of the ITFS resource. The current rules have been effective and can continue to be effectively implemented to assure the *bona fide* educational nature of ITFS applicants, with the further interpretations made below. The controversial outstanding issue is the place of nonlocal applicants, particularly the national entities, in the licensing process.

16. Locally based educational entities have been convincingly demonstrated by the commentors to be the best authorities for evaluating their educational needs and the needs of others they propose to serve in their communities, for designing courses to suit those needs, and for scheduling courses during the school year. They best understand the educational needs and academic standards of their communities and are the most appropriate bodies to produce educational programming or select such programming from the sources available. Thus, they can act most responsibly in designing and developing ITFS systems. Locally based curriculum development, instructor involvement, supplementary (print) material development, student feed-back, and assistance to participating students all provide critical contributions to the most effective use of instruction via television.

17. National organizations, however, can have a significant role to play in the development and delivery of ITFS service. While their nonlocal nature precludes many of the most desirable characteristics of an ITFS licensee, they can, as noted, complement the services offered by local licensees in several ways. Also, their lack of local identity, credentials and responsibility can be mitigated to some extent by the inclusion of appropriate local persons and entities in positions of responsibility for the operations in individual communities. Therefore, it is not necessary or appropriate to disqualify all nonlocal applicants from consideration as licensees. However, when the Commission originally envisioned that leasing would promote the development of all educational entities, it did not foresee the rapid spread of nationwide filing. *Further Notice (83-523), supra* at paras. 15-17. It was not anticipated that a few MDS operators would funnel most of their financial resources primarily into a small number of nonlocal entities that, in turn, have applied for hundreds of channels nationwide. This has occurred at the expense of potential local applicants, many of which would be dependent on such funds to apply for authorization. It is obvious from these numerous applications on file by national organizations that intend to lease time that MDS operators are very interested in supporting the initiation of ITFS service, in exchange for airtime, in a great number of communities. If channels were more available, or if the support of commercial MDS operators were offered to

local entities, we would expect to see an increase in the number of local educational institutions and organizations applying for ITFS licenses, given the unfettered opportunity to apply for channels and to negotiate lease agreements. Moreover, a heightened interest by local applicants has been demonstrated by the increased number of applications filed by such entities. Local entities would generally provide even greater public benefits than would nationals, as local educational bodies are the most expert and accountable authorities for determining and serving the educational needs of their communities. None of the nonlocal applicants on file enjoys any physical presence or prior involvement in the communities where they have applied, and they also are unaccredited. Some were not founded strictly for educational purposes.[5]

18. For these reasons, we believe an opportunity should be opened for all local entities to attempt to avail themselves of the benefits of leasing or their own non-ITFS use of excess channel capacity. This will be accomplished by the introduction of a "local priority period." After an adequate period of time to implement this opportunity, whatever channels remain unassigned would be made available to any applicants, including national entities, who are found to be eligible. Under this procedure more local entities will have the opportunity to fill more channels as financial support from non-ITFS use becomes more widespread. Existing local operators also can incorporate non-ITFS use into their systems to generate revenues to improve their educational offerings. These are opportunities which have not yet occurred to any significant extent, as explained, contrary to the Commission's intentions in liberalizing the use rules in *Report and Order (80-112), supra.* Revenues obtained from the use of excess capacity would thus directly support the programming choices of local entities engaged in education. Thus, a local priority period appears to be the wisest and most efficient plan for managing the newly-crowded ITFS spectrum.

19. This procedure does not deny eligibility to nonlocal applicants, but recognizes a strong preference for local entities, including those which need a system but have been precluded or discouraged from filing by the flurry of nonlocal applications. After a period of time, however, seriously interested local parties will have had reasonable opportunity to apply, and this consideration must give way to the countervailing desirability of making use of vacant channels. Accordingly, the local priority period will be the minimum necessary to achieve the aforementioned goals.

20. Meanwhile, the national entities can still foster participation in ITFS service by local educational entities by developing, producing and supplying instructional programming for them. They should be able to

[5] For example, one nonlocal applicant is the fund-raising arm of a university, not the university itself. (The University has applied for its own channels locally).

accomplish this without holding ITFS licenses. If the programming they have available and have proposed to use in their numerous applications is quality instructional programming, desirable to schools and other entities they propose to serve, it will be in demand by licensees. These local licensees can act autonomously to use the funds derived from non-ITFS use to purchase this programming, thereby financing it, for the instruction they see fit for their students. This opportunity is greatly enhanced by other actions taken herein. The anticipated increase in ITFS applications and operators, as well as the essential use and substantial use provisions adopted (paras. 75 and 95, *infra*) will increase the demand for ITFS programming.

21. Currently, there is little history of leasing by local entities. After this Order, however, that use should expand as applications on file are granted. Also, it is anticipated that MDS operators will approach eligible local entities with proposals for new stations, based on their support of the development of ITFS systems by nonlocal applicants. It may take several months to negotiate lease agreements, and several more to file applications and receive authorizations. As this use grows, other schools will have the opportunity to discover and observe the workings and benefits of ITFS, as well as the possibilities presented by leasing or self-use of excess channel capacity. A one-year period should provide ample opportunity for serious candidates to observe the new systems, consider whether and how they can utilize this service, and prepare and file applications. Accordingly, the local priority period will extend for one year after the effective date of this Order (see para. 140, *infra*). No applications can be filed by nonlocal applicants prior to that time.[6] Also, applications currently on file by nonlocal applicants will not be considered in effect during the period. Thus, pending applications by local applicants for any channels already requested by nonlocal applicants can be acted on, and local entities can file new proposals for any channels requested by nonlocal applicants that are not already cut off by other local applicants pursuant to the interim cut-off procedures adopted in *Further Notice (83-523), supra.* However, applications by nonlocal entities which have already been cut-off from competing proposals and petitions to deny by the interim cut-off procedures will retain their cut-off status at the end of the local priority period, if their requested channels are not requested by or authorized to local applicants during the period. Thus, any such currently cut off applications by nonlocal entities which remain viable

[6] Before the issuance of *Further Notice (83-523)* and during the period following the adoption of interim processing standards set forth therein, certain applications of some nonlocal entities were granted, consistent with processing criteria then in effect, based on prevailing circumstances. Authorizations granted as of the date of adoption of the instant Order will be "grandfathered."

after the local priority period will not be subject to later competition and will be available for immediate consideration, upon affirmation by the applicant of its continued prosecution of the application.[7] Any applications mooted by grant of current or intervening applications filed by local applicants, or whose prosecution is not affirmed by the applicant at the end of the local priority period, will be dismissed.

22. For purposes of the local priority period and for selection among mutually exclusive applicants, the Commission will regard as "local," institutions and organizations that are physically located in the community, or metropolitan area, where service is proposed. For colleges and universities, this would include areas where they have a campus. Educational organizations will generally be regarded as "local" if the address of the organization's headquarters is located within the area where the facility is sought. Entities created by a state or local government for the purpose of serving formal educational needs will be considered "local" throughout the area within the government's jurisdiction over which its authority is intended to extend. Educational entities located within a state and created by affiliated educational institutions[8] within that state will be considered "local" in those areas where the member institutions are located (*e.g.*, Indiana Higher Educational Telecommunications System).[9]

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[7] To continue prosecution of such an application, the applicant will also be required to submit appropriate amendment(s) to conform the application to any other provisions adopted herein. Those applications may be subject to additional petitions to deny, limited to the specific subject(s) of such amendments or other events occuring during the interim period.

[8] Hospitals present a special category of ITFS operator, see para. 79, *infra.* The provisions set forth above will thus be applicable to hospitals or hospital associations.

[9] The Public Broadcasting Service (PBS) was granted a number of construction permits prior to the filing of most of the other national applications and before the Commission could fully evaluate the cumulative impact of all national applicants on the ITFS service. *Public Broadcasting System ITFS Applications,* 96 FCC 2d 555 (1984). Although these and other subsequent grants are grandfathered, PBS does not conform to the definition of a local entity as adopted herein. It is a national organization and the existence of member stations that are independently owned and operated in certain communities is not a sufficient basis upon which to categorize PBS, itself, as "local." Therefore, based on our determinations in this proceeding, all presently pending applications filed directly by PBS will be treated in the same manner as those of other national applicants. Applications can be filed by the local member stations, which would enjoy the characteristics of any other local applicant for basic eligibility and comparative considerations. PBS has stated that the outstanding construction permits issued to it will be assigned to the licensees of local educational television broadcast stations, where requested by such licensee. This has already been accomplished in some cases. Local licensees that file their own applications for permits in communities where PBS has authorized ITFS channels, will be required to demonstrate the need for such applications in lieu of seeking assignment of the PBS permits.

23. Whether an applicant is local or nonlocal, it still must be found eligible to obtain an ITFS license. The existing rules provide needed flexibility in deciding who is eligible to be an ITFS licensee. Therefore, the basic categories of eligible applicants will be only slightly modified: (1) educational institutions engaged in the formal education of enrolled students (*e.g.* public and private schools, colleges and universities); (2) governmental organizations engaged in the formal education of enrolled students (*e.g.* school boards and school districts); (3) nonprofit organizations whose purposes are educational and include providing instructional television material to such institutional or governmental organizations. As nonprofit organizations eligible for noncommercial educational broadcast stations can generally meet this last criterion, their specific inclusion is no longer necessary. *Compare* 47 C.F.R. §74.932(a).

24. The Commission will continue to consider accreditation as an eligibility factor. 47 C.F.R. §74.932(a)(1)(2). Accreditation, in the case of primary and secondary schools, or their governing authorities, indicates that they will conform to state-mandated academic standards. Accreditation, in the case of colleges and universities, shows they observe accepted standards of higher education.

25. Accredited schools, colleges and universities are expected to serve the formal educational needs of their students. All applicants lacking accreditation must perfect their eligibility by showing that they will serve the needs of students of accredited schools. Otherwise, they may not enjoy the support of the schools or other organizations they propose to serve, or they may not be accountable to them, and the essential purpose of the ITFS service, which is to provide formal educational programming to students enrolled at accredited schools, may not be met. In the interim application processing period established by *Further Notice (83-523)*, applicants attempted to demonstrate the participation of their intended school receive sites by securing letters or other documentation from these entities. In most cases, the letters were vague and did not effectively demonstrate the schools' demand and intended use for the ITFS services proposed.[10] Since the utilization of the offered programming service by

[10] On March 20, 1984, the Commission's staff directed inquiries to most of the nonlocal applicants then on file. The applicants were asked, among other things, to submit letters of reasonable assurance of intended use of their services from their proposed receive sites and to describe how local groups were involved in each proposal. Most of the applicants did not respond with any letters from the majority of the markets in which they applied. Most of the letters or other documentation which were submitted evidenced little more than general interest in the national network proposals or did not demonstrate any clear intent to use the programming service proposed in the application in educational curricula. A few national applicants submitted standardized narrative descriptions of the manner in which they hoped local groups would be involved. The interim rules established by *Further Notice (83-523), supra* at para. 38, again required

specified receive sites constitutes the basis for any proposed ITFS operation, all applicants not proposing to provide formal educational programming to their own enrolled students must submit letters from those receive sites utilizing their programming.

26. The commentors discussed how such letters could be made more effective than those required in the interim processing period. Based on their suggestions, letters will be required to include the following: they must be written and signed by an administrator or authority who is responsible for the receive site's curriculum planning. The administrator must indicate that the applicant's program offerings have been viewed and that such programming will be incorporated in the site's curriculum. The letter should discuss the types of programming and the hours per week of formal and informal programming expected to be used and the site's involvement in the planning, scheduling and production of programming. If other levels of authority must be obtained before a firm commitment to utilize the service can be made, the nature and extent of such authorization(s) must be provided. These requirements are intended to ensure that service to accredited schools, upon which the applicant's eligibility is based, will be provided. The requirement should not be unduly burdensome for applicants proposing a desired service, and no less should be required before an authorization is issued to construct and operate an ITFS station for ten years.

27. An applicant's receive sites must be appropriate to its statement of educational purpose, as required to be set forth in its application. For example, an applicant proposing elementary school level programming should submit a letter of intended use from at least one elementary school. An applicant requesting multiple channels to provide service to

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letters of assurance from all applicants not proposing to serve their own in-school needs. Some of the existing applicants, local and nonlocal, continued to make efforts to demonstrate that local entities desired to incorporate the proposed service in their curricula. New national applicants filing during the interim cut-off period for the first time submitted no supporting letters of assurance to conform to the interim rules. In this connection, the many difficulties an applicant may face when introducing schools to an unfamiliar technology are recognized. Receive sites may not make strong commitments to use proposed programming prior to viewing it, or they may desire ITFS channels to air their own programming and submit only vague and generalized information regarding their plans to use the applicant's programming. In those markets in which an application was not mutually exclusive and where letters appeared to demonstrate reasonably, under the interim standards, an intent to use the proposed service, construction permits were granted. In the other "singleton" cases, the showings were not considered sufficient to sustain a ten-year grant of the limited ITFS resource, even when viewed in the most favorable light. Given the generally vague and inconclusive showings made by these applicants to date, more specific guidelines are adopted herein for making the demonstrations of local support and involvement in the future.

both high schools and colleges should submit letters form both kinds of institutions.

28. According to most commentors, letters from proposed receive sites are insufficient, by themselves, to protect against the drawbacks of nonlocal proposals. Even with receive site support and accountability, a nonlocal applicant remains far removed from the educational needs of the community or communities it intends to serve. As the commentors forcefully argue, nationally fed catalogue programming must be evaluated by local educators and tailored to each community's educational needs. *Further Notice (83-523), supra,* recognized that national applicant proposals were often not tailored to the educational needs of the individual communities. The comments indicate that national applicants are simply unable to make certain programming decisions that are simultaneously tailored to many communities across many states. Therefore, nonlocal applicants, in addition to submitting letters of intended use from proposed receive sites, will also be required to establish a local program committee in each community where they apply.

29. Because local program committees are new to the ITFS service, they will not be burdened with detailed regulatory requirements, and no specified number or percentage of the committee members will be required to be local representatives. Each receive site, however, should have some representation so that its particular programming and scheduling needs will be considered. Therefore, each receive site's letter of intended program use of a nonlocal licensee's service must confirm that a member of its staff will serve on the local committee and demonstrate a recognition of the composition and power of the local committee. The letter should show that the representative will aid in the selection, scheduling and production of the programming received over the system.

30. Other suggested criteria for establishing the eligibility of nonlocal educational organizations will not be adopted. Many commentors would expect all nonlocal applicants to show they are accredited educational institutions. However, this would severely and unnecessarily restrict the scope of nonlocal applicants who could apply. Most nonlocal applicants to date have been unaccredited organizations. As other commentors have noted, the fact that an organization is unaccredited does not preclude an ability to provide quality formal educational programming, and unaccredited local organizations have operated successful ITFS systems. The suggestion to require showings of prior local involvement or educational experience will also be rejected. Nonlocal applicants cannot be expected to have prior local involvement in the communities in which they applied, and this does not conclusively demonstrate any inability to provide a valuable service. Whether or not an applicant is local, if it is unaccredited it must still be a nonprofit organization with educational purposes that delivers

ITFS programming to educational institutions or governmental organizations engaged in the formal education of enrolled students in order to be eligible for an ITFS license. Furthermore, as previously expressed, Commission policy is to encourage new entities to enter the service.

31. Various other suggestions were made to require nonlocal applicants to submit articles of incorporation and bylaws, certificates of nonprofit status, and financial reports. These criteria were intended to attract only genuinely educational entities to the service. For example, more detailed financial reports are suggested to "avoid speculative filing;" NITV complains that some applicants rely heavily on lease revenue for financing without having a negotiated lease in hand. These requirements, alone or in combination, would do more to add to the burdens of paperwork for both the applicants and the Commission's staff than to screen applicants effectively. The Commission has the discretion to request the applicant's articles of incorporation or other information in any individual case where such review appears warranted. Therefore, the rules will not be amended to require any group of applicants to submit these documents. Applicants will be required to provide certification regarding their tax exempt status or their accreditation when their eligibility depends on these factors.[11]

32. A few commentors urge the Commission to consider an eligibility factor unrelated to the applicant's local ties. The Hispanic Information and Telecommunications Network (HITN), among others, contend that Hispanics are underserved by traditional communications media and have a special need for ITFS frequencies. These factors, they say, should enter into our eligibility considerations for Hispanic applicants. The preference accorded to local applicants is based on factors unrelated to any specialized audience for educational programming that an applicant may propose to serve. All national ITFS operators, whether minority or not, Hispanic or not, suffer the same inherent disadvantages stemming from their distant connection to their local audiences. This is not overcome by the minority nature of an applicant. The appropriateness of a preference for minority applications in a comparative context is addressed in the section on selection procedures for mutually exclusive applications, para. 51, *infra.*

Mutually Exclusive Selection Procedures

33. Currently, there are no procedures for selecting among mutually exclusive ("MX") applications. The abundance of vacant channels prior to

[11] Factors such as accreditation, educational background and experience and history of educational service will be considered, where appropriate. Whether certain of the present nonlocal applicants will qualify as the kind of nonprofit organization entitled to ITFS licenses is a matter which will be considered when, and if, their applications are considered after the local priority period.

Report and Order (80-112), supra, prevented the development of MX applications and permitted private resolutions where applicants coincidentally requested the same channels. *Notice (83-523), supra,* had solicited comments on selection procedures that might be used for ITFS, but the significant increase in applications resulting from the liberalized uses of the frequencies occurred after the solicitation of comments, so comments were again solicited on methods for selection among MX applications in *Further Notice (83-523), supra.* The Commission noted the commentors' initial rejection of full evidentiary hearings and of a first-come, first-served procedure, and proposed not to consider those possibilities further. The key alternatives proposed were a lottery with preferences, a paper hearing, a point system, or a combination method, such as a point system with a tie-breaking mechanism. In addition to the method for selecting among MX applicants, comments were solicited on what criteria, if any, should be used and the relative weight to be afforded to each under any procedure adopted for selection among MX applicants. *Further Notice (83-523)* specifically suggested that the criteria might include the nature of the applicants, and particularly any established presence in the community; the amount of programming for in-school use; and the amount of other traditional ITFS programming. *Id.* at para. 35.

34. The commentors continue to reject full evidentiary hearings and first-come, first-served procedures. They oppose the former because it would involve undue time and expense and the latter because it would disadvantage local educational entities that often cannot act as quickly as other potential ITFS applicants, especially those that would lease excess capacity and have access to the resources of their proposed lessees.

35. Few commentors favor a lottery, and most believe that it is inappropriate for ITFS regardless of any weighting system used. Generally, those preferring the lottery indicate that its primary advantage is its low cost, so that the better financed applicants would not enjoy a significant advantage over their competitors. On the other hand, many commentors believe that a lottery cannot adequately make the necessary distinctions among competing applicants. One argues that a lottery is inadvisable because giving all eligible applicants a statistical chance of winning diminishes the likelihood of the best applicant receiving the grant. Another stresses that a system more deliberative than a lottery is appropriate because the emphasis in ITFS is on education. It is the belief of one party that a lottery would be inadequate because a hearing would be required at minimum for matters relating to eligibility and anticipated safeguards to prevent the subversion of the educational purposes of ITFS. Questions are raised about the Commission's authority to use a lottery for ITFS, since the number of MX ITFS applications is not so large, or expected to become so large, as to make it impractical to employ

a comparative proceeding, in contrast to other services which have employed lotteries. Assuming that lotteries could be used, the comments differ on whether a preference for minorities should be required or would be appropriate for a service whose primary purpose is educational in nature.

36. A large number of the commentors favor paper hearings as a selection procedure, arguing that the important educational needs served by ITFS require a nonrandom comparative evaluation of competing applicants. Shifting the weight of preferences, depending on the individual situation of a particular community, is perceived as a specific advantage of this approach. Another advantage stated is that paper hearings would permit administrative law judges, who are experienced in comparative evaluations, to make the selections. The specific implementation procedures for paper hearings vary among the parties, with most preferring a streamlined or abbreviated paper hearing process that would have many of the advantages of a full hearing, but would involve significantly fewer applicant and Commission resources. One variation proposed would have a hearing for an entire community in one proceeding in order to achieve the optimal balance of educational and instructional programming.

37. Several parties also favor a point system, which would nominate the applicant accumulating the highest total of points, based on predetermined criteria that are assigned specific values. This selection procedure is viewed as having the dual advantage of being a comparative evaluation and one that can be expeditiously administered. One commentor indicates that the point system appraisal could be used for both qualitative and quantitative considerations. Some of the commentors propose that the preferences for this system be based only on eligibility requirements, while others believe that it should be based on any factors which would best further the objectives of ITFS. Commentors disfavoring the point system generally believe that it is not sufficiently sensitive for making the necessary judgment calls.

38. Commentors overwhelmingly favor a preference for local applicants in deciding among mutually exclusive applications for much the same reason they believe local identity or involvement should be a prerequisite for basic eligibility. They differ, however, as to the weight that should be afforded to any local preference. One commentor contends that local presence is irrelevant if the applicant has an established relationship with the local educational community. Other comparative criteria are also suggested, as discussed below.

Discussion

39. The use of a point system, with a tie-breaker device for tied cases, constitutes the best method of selecting among mutually exclusive ITFS applicants. It will provide a reliable mechanism to process and evaluate

applications and compose a meaningful comparison among them, based on criteria deemed essential to the effective and efficient use of ITFS channels. In this respect, it effectively comprises a paper hearing and accomplishes the same objectives, but with a less cumbersome and expensive procedure. This is particularly pertinent here considering the nature and resources of most ITFS applicants. It will also result more consistently than would a lottery in the selection of the best qualified applicant where there is a meaningful difference between competing applicants. This is particularly relevant considering the nature and importance of the valuable educational objectives of the service to be provided, and the significant differences between applicants.

40. Contrary to some objections, the system will not result in the award of licenses on an arbitrary basis. Points will be awarded only for those factors most germane to the provision of ITFS service and according to their relative importance. Where there are no differences of decisional significance between leading applicants, a tie-breaker device will avoid the effect of awarding licenses based on minor or arbitrary differences. Thus, "those applications that are clearly superior will be granted. Those that are clearly inferior will be denied. Those that are without substantial and material differences will be designated for random selection. . . ." *Second Report and Order* in General Docket No. 81-786 (*"Random Selection Lotteries II"*), 93 FCC 2d 952, 990 (1983).

41. There is ample authority for this procedure in the Commission's mandate to "encourage the larger and more effective use of radio in the public interest" and its wide latitude to "conduct proceedings in the manner as will best conduce to the proper dispatch of business and to the ends of justice."[12] This procedure also complies with Section 309 of the Communications Act (47 U.S.C. §309) and its interpretation in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), in selecting between mutually exclusive applicants via a reasoned decision based upon relevant comparative criteria, with all applicants enjoying an equal opportunity to demonstrate the relative merits of their applications. In another proceeding in which a similar procedure was proposed for selection among applicants in the Multipoint Distribution Service, the Commission recognized this procedural flexibility afforded by Congress and its authority to set comparative criteria and their respective weights by a rulemaking proceeding.[13] In proposing various alternatives to oral comparative

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[12] 47 U.S.C. §303(g); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943); 47 U.S.C. §154(j).

[13] *Notice of Inquiry and Proposed Rulemaking* in CC Docket No. 80-116, 45 Fed. Reg. 29335 (1980) at paras. 48, 51. A lottery selection procedure ultimately was adopted instead, in response to the new lottery statute, Public Law 97-259, 96 Stat. 1087, 1094-95, Sept. 13, 1982, 47 U.S.C. §309(i). *Second Report and Order* in Gen. Docket No. 80-112, FCC 84-568, released February 1, 1985.

hearings, it found that oral comparative hearings are nowhere mandated, and reasoned that "no hearing need be held where there are no disputed facts to resolve," and that "no right to a meaningful hearing is denied if there are no meaningful issues to be heard."[14] Here, as there, "evaluation of relevant issues for a license award would not ordinarily be enhanced by the traditional courtroom drama of oral presentation by witnesses or cross examination of these witnesses on the stand. Live testimony, affording the opportunity to judge demeanor and credibility of a witness would afford nothing in this context."[15] In those cases where a substantial and material question of fact is raised, an applicant's substantive rights will be preserved by designating a hearing to consider that specific fact or facts. (See para. 65, *infra.*)

42. The use of a tie-breaker device in this situation comports with the requirement of the Administrative Procedure Act for reasoned decision-making and rationality (5 U.S.C. §706(2)(a)) by avoiding a strained or arbitrary decision where there is not a meaningful distinction between applicant's qualifications. Due to the mathematical equality of opportunity which will be inherent in the random selection tie-breaking mechanism which will be applied, it is a fair and rational decision-making device where applicants are in virtual equipoise on comparative factors and, arguably, may be required to avoid arbitrary or capricious action. This use of random chance to choose among mutually exclusive applicants which are otherwise similarly qualified was previously asserted by the Commission in *Notice of Inquiry and Proposed Rulemaking* in CC Docket No. 80-116, *supra* at paras. 60-76. *See also, MCI Cellular Telephone Co.*, 96 FCC 2d 1015, 1035 (1984). It was suggested as long as fifteen years ago by Judge Leventhal, in a comparative selection case with numerous similarly qualified applicants: "Perhaps a lottery could be used, for luck is not an inadmissible means of deciding the undecidable, provided the ground rules are known in advance." *Star Television, Inc. v. FCC*, 416 F.2d 1086, 1095 (D.C. Cir. 1969) (dis.).

43. Although the lottery statute has led to the effective and appropriate utilization of lotteries as a primary selection mechanism in other services,[16] they are neither required nor appropriate for that function in selecting among ITFS applicants. The lottery has been specifically authorized by Congress for those situations in which a significant public benefit would flow from its use. The decisional criteria for employing lotteries include considering whether (1) there is a large number of licenses available in the particular service; (2) there is a large number of mutually exclusive applications for licenses; (3) there is a large backlog;

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[14] *Id.* at paras. 39ff, 69, 71.

[15] *Id.* at para. 59.

[16] Public Law 97-259, 96 Stat. 1087, Sept. 13, 1982 (47 U.S.C. §309(i)).

(4) a lottery would significantly speed up the process of getting service to the public; and (5) greater diversity of information in a community would result.[17] Although the number of available licenses is large, and the backlog and number of mutually exclusive ITFS applications has reached an unprecedented level for this service, it is not so great, and is not expected to become so great, as to make the lottery the most practical and efficient method for selecting among mutually exclusive applications. Additionally, the actions taken in this Order will significantly reduce the number of MX situations and promptly reduce the backlog.[18] Furthermore, as stated in connection with the decision to use lotteries as a primary selection method only on a case-by-case basis for Private Radio services, "in some cases, expedition does not outweigh consideration of other public interest factors, *e.g.*, public safety and more efficient use of the spectrum." *Random Selection Lotteries II, supra* at 953. According to that decision, lotteries, although now authorized by statute, will be applied to Private Radio selection "only when it appears that there are no substantial and material differences in the qualifications of competing applicants to serve the public interest." *Id.* at 989. A similar consideration is appropriate here given the nature and importance of the valuable educational objectives of ITFS and the significant differences between applicants in the ITFS service. Moreover, the point system adopted in this Order will result in the expeditious processing of mutually exclusive applications and the speed with which a lottery would result in a selection would not be significantly faster, if at all.

44. Procedurally, the selection process will operate as described below. In cases where there are mutually exclusive applications, each application will be reviewed to determine the number of merit points to be awarded to it, according to each of the criteria discussed below, with the "tentative selectee"[19] being the applicant with the highest point total. In the case of a tie for highest point total, a random selection tie-breaker will be employed to determine the tentative selectee. (See para. 50, *infra.*) Any petitions to deny against the tentative selectee will then be considered. (See para. 65, *infra.*) The application processing procedure will be administered by the Mass Media Bureau, with final action taken by the full Commission in all comparative cases.

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[17] *See,* Conference Report, H.R. Rep. No. 765, 97th Cong., 2d Sess. 37 (1982).

[18] The numbers of applications do not begin, nor are they expected, to approach those involved in other services that use lotteries. Fewer than 500 ITFS applications are mutually exclusive, compared to the over 16,000 applications pending in the MDS Service, over 20,000 in the low power television service, and over 5,100 in the cellular radio service.

[19] The status of a selectee is tentative until any petitions to deny its application have been ruled upon.

45. The use of any point system involves subjective judgement, but the criteria used in making selections among ITFS applicants must be calculated to grant licenses to those applicants that are most likely to best meet the educational and instructional needs of the various communities. The specific weight assessed to each characteristic will represent the relative significance deemed, in the Commission's best judgment, appropriate to those factors. Although the use of ITFS now includes many instructional uses outside of the formal classroom, reflecting changes in educational needs and the means of satisfying them, the purpose of the service remains primarily on the transmission of instructional and educational materials.

46. For the reasons stated in the discussion on eligibility (paras. 15 - 32, *supra*), "local"[20] applicants will receive the highest award, with four points toward their total.

47. Another significant factor will be whether an applicant is an accredited school or educational institution, as proposed by several commentors. These parties are the providers of education and are the most likely to have the academic and staff resources, as well as the perspective, to develop educational programming to meet specific current and future educational needs. Educational institutions are more likely to be attuned to the educational needs of the area and have developed relationships with significant members of the educational community more so than other organizations. Those institutions which are accredited demonstrate the best evidence that they are functioning at a level which meets, at minimum, standards prescribed by governmental or other recognized bodies responsible for formal education. Governmental bodies, or other entities such as an archdiocese, which are responsible for the administration of accredited schools deserve the same consideration where they will reflect the views of state and local officials responsible for education. Accordingly, accredited schools and educational institutions and school boards and school districts, applying within their jurisdiction, will receive three points toward their total. There will be no differentiation between levels of schools, or between public and private schools, as urged by some commentors. All have distinct and legitimate needs, and the Commission is not in the position to determine which are more significant than others.

48. Another significant factor will be the operation of other ITFS channels by the applicant. The Commission has held to its original determination to limit the number of channels granted to each licensee in a particular area.[21] *Memorandum Opinion and Order (83-523), supra.*

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[20] "Local" applicants are defined in the eligibility discussion, para. 22, *supra.*

[21] *Memorandum Opinion and Order* in Docket No. 14744, 39 FCC 846 (1963); 47 C.F.R., §74.902(c).

This determination is due to the limited availability of and increased demand for ITFS channels, and will promote the diversity of services that can be provided by the greatest practicable number of ITFS licensees. An applicant whose request would result in the authorization of four channels or less will be preferred over an applicant that would exceed the four-channel limitation, even when the latter is accompanied by a sufficient waiver request.[22] Accordingly, applicants whose request would result in a total acquisition of four or fewer channels in the community will receive two points towards their total.

49. Points will be awarded for certain factors that contribute to the most effective utilization of the spectrum for ITFS service. The extent of use of the frequencies for their intended purpose by an applicant will be one factor. A weekly schedule of twenty-one or more hours per channel of formal instruction or of forty-one or more hours per channel of other ITFS service will merit one point. A weekly schedule of forty-one or more hours per channel of formal instruction or of twenty-one or more hours of formal instruction plus forty-one or more hours of other ITFS service per channel will merit two points.[23] There will be no award for the least amount of commercial programming, as proposed by one commentor, as there is no inherent detriment caused by non-ITFS programming *per se.* Also, one point may be awarded to an existing licensee of E or F channels that is seeking to relocate to other channel groups, upon a showing of an established need for an expanded service that cannot be accomodated on its grandfathered E or F facilities. The burden will be on the applicant to request this last preference and to submit information in support of the request.

50. Where the best qualified (highest scoring) of two or more applicants are equally qualified under these criteria (have the same point total), the tentative selectee will be chosen through a tie-breaker mecha-

[22] The diversity consideration regarding common ownership with other local media is less relevant than in broadcast services, given the nature of ITFS service, and is not sufficiently significant compared to other criteria adopted herein to warrant a point award.

[23] These points will accrue only to programming scheduled between 8:00 a.m. and 10:00 p.m., Monday through Saturday, excluding holidays and vacations, the hours during which the most meaningful utilization by recipients will occur. See paras. 93 - 95, *infra.* Hours per channel per week are determined by totaling the number of scheduled hours per week of programming between 8:00 a.m. and 10:00 p.m. Monday through Saturday in the subject category, and dividing that total by the number of channels. For example, if an applicant proposes: for channel G1 - 54 hours of ITFS service, including 20 hours of formal ("essential use") instruction; for channel G2 - 62 hours of ITFS service, including 42 hours of essential use instruction; and for channel G3 - 40 hours of ITFS service, all of its essential use instruction, that applicant has proposed 34 average hours per channel per week of essential use instruction (102 + 3) and 18 average hours per channel per week of other ITFS service (54 + 3), for 1 point for effective utilization of the spectrum.

nism. The tie-breaker will use a mechanical random-selection process, under the direction of the Secretary's office, in which each applicant has an equal chance.[24]

51. A point award for minority applicants was specifically considered and rejected. Minority applicants have traditionally been favored in the Commission's comparative proceedings for broadcast services, based on the nature of the particular services and their audiences. As ITFS is intended as an educational service, rather than a general interest consumer medium, the diversity goal underlying that traditional minority preference in broadcast services is not applicable here. To the contrary, to award a preference arising from this rationale would implicitly emphasize the significance of permitted secondary services, *e.g.*, general appeal and commercial programming, over the essential educational uses of the ITFS frequencies. Such a use is not even a factor in the plans of many ITFS applicants. ITFS licensees have a wide responsibility to the entire student population they serve, and the Commission will rely on the judgment and discretion of these professional educators to determine any special needs that must be met, and to design and redesign their programs to meet them. The minority status of an applicant is thus not sufficiently germane to the provision of ITFS service to provide a basis upon which to prefer one applicant over another. The preference concerning diversity of overall media ownership made in comparative proceedings for the same services are also not relevant here, given the disparate missions of the services involved. Desirable diversity of ownership within the ITFS service itself and desirable availability of ITFS frequencies to the greatest practicable number of users are recognized by the four-channel limitation itself and by the point award for compliance with that limitation.

52. A number of other suggested preferences will not be adopted. A difference in the number of students served and the extent of their use of ITFS programming does not warrant a preference of itself, as it does not account for actual use by students or the value of the programming and its integration into specific curricula by the school. The telecommunications experience of the applicant's staff is not as significant as other factors. To the extent that a community-based staff and production facilities are relevant, they are reflected in the local preference. Exclusive ITFS use of the channels does not necessarily represent the best use beyond the extent already accounted for in the proposed service calculation. Retention of control by the licensee, beyond the limits addressed in

[24] This random chance tie-breaker is not adopted under the authority of the lottery statute (47 U.S.C. §309(i)). It is employed only to choose among applicants which have already been determined to be equally qualified on all relevant qualification grounds, not as a primary comparative selection method. Consequently, the provisions of the lottery statute governing random selection in other circumstances are not controlling.

para. 103, *infra*, is not necessarily critical and is subject to infinite gradations.

Cut-Offs

53. Currently, there are no cut-off periods or other restrictions for the filing of petitions to deny or the filing of applications that are mutually exclusive with others already on file.[25] Prior to *Report and Order (80-112), supra*, any such procedure was not essential given the limited number of applications. Since the relaxation of the rules and the provision for non-ITFS use of excess channel capacity, the efficient processing of the increased number of applications filed has necessitated a cut-off procedure, and *Further Notice (83-523), supra*, proposed the use of either the traditional A and B cut-off dates[26] or the "window" approach[27] to protect pending applications.

54. The window approach is favored by a few commentors, who generally view its ease of administration as its main advantage. Many commentors, however, believe this approach is inappropriate for ITFS. They maintain that the window mechanism would result in the filing of arbitrary and speculative applications and would encourage the hoarding of channels. It is argued that the public interest also would be disserved by needless costs generated in preparing and filing these applications. Others argue that it would be difficult for educational organizations and institutions to file applications during a window period because they do not usually have in-house engineering staff and communications counsel

[25] *Further Notice (83-523), supra*, established a cut-off period for all applications accepted for filing on or before August 15, 1984, the date of publication of the Notice in the Federal Register. Applications filed after that date by local applicants, that are pending and are not mutually exclusive with earlier filed applications, will be subject to the cut-off procedures established in this proceeding. Applications filed after that date by nonlocal applicants that have not achieved cut-off status by being mutually exclusive with earlier filed applications, will be dismissed. See paras. 18, 21, *supra*.

[26] The traditional cut-off involves placing the first application(s) accepted for filing and determined to be substantially complete, on a public notice called an "A cut-off list". This list notifies the public that the application has been accepted and gives interested parties a period of time to file competing applications or petitions to deny. The application(s) triggering the "A" cut-off list are required to make any major changes to its proposal prior to the end of the A cut-off period. After the "A" period expires, all substantially complete applications filed during that period are placed on a "B" list. This list notifies the public that these applications have been accepted for filing and provides a period of time for filing petitions to deny or minor amendments. *See, e.g.*, 47 C.F.R. §73.3572(c).

[27] The "window" or "date certain" cut-offs specify a date or period for filing applications for new facilities. No applications are accepted before or after the stated window of opportunity for filing. Applications filed in response to the window which are mutually exclusive are considered together. Any single application can be processed and granted where there are no deficiencies or meritorious issues raised against it. The period for filing petitions to deny against applications varies depending on the needs of the particular service. *See, e.g.*, 47 C.F.R. §73.3572(f)(1).

needed to respond quickly to a window notice. They also state that their operating budgets are usually approved on an annual basis and are subject to multiple stages of review, making necessary budgeting and long-range planning difficult or impossible on short notice.

55. The commentors generally prefer the traditional A/B cut-off procedure, primarily because it is a demand-oriented approach, allowing applicants to file for channels as the need or interest arises. Some also prefer the A/B cut-off because it is a time-tested process with established procedural law and offers better notice to existing operators and encourages private settlements. Most believe that 60 - 90 days constitute the optimal balance between the additional time that educational institutions need to plan and file ITFS applications and the goal of commencing service without undue delay. One commentor recommends that if the Commission adopts a cut-off period of less than 60 days, educational institutions be permitted to file contingent applications.

Discussion

56. The traditional A/B cut-off approach offers the best method for establishing a finite period for filing mutually exclusive applications and petitions to deny in the ITFS service. Educational institutions and organizations typically do not have expertise in filing for Commission licenses or an in-house staff of communications attorneys and engineers who can expeditiously prepare ITFS applications. One commentor correctly points out that these entities often need governmental or other authorization or funding before applying for ITFS facilities.[28] Time may also be required to negotiate a lease for the use of excess channel capacity. A window period would require educators and nonprofit organizations to apply for channels under an arbitrary deadline, without going through routine budgetary and planning procedures, and may prevent them from applying together. It would be counterproductive to establish a procedure whose time constraints would place the educational community at this significant disadvantage.

57. The A/B cut-off, on the other hand, will provide a longer period of time for all interested parties in every community to assess the need for ITFS programming and plan for ITFS facilities, essentially until an application is filed for the last available channels in a community. The traditional A/B cut-off approach will avoid problems anticipated by commentors, particularly the warehousing of channels due to the uncertainty of whether, or when, further application opportunities would occur.

[28] In *Notice of Proposed Rulemaking* in MM Docket No. 84-750, 49 Fed. Reg. 36523 (September 18, 1984), the Commission recognized that a window/first-come-first-serve approach would not be appropriate for noncommercial educational FM and TV applicants because of those parties' special problems, *e.g.*, the securing of funding, staff and programming before applying for a facility. *Id.* at n. 10.

Filing windows have been adopted (in conjunction with subsequent first-come, first-served provisions) in services where numerous applications are anticipated or less differentiation exists between applicants than is the case in ITFS, *e.g.*, low power television. Also, in those services there will usually be an applicant prepared to file by the end of the window period. These situations do not exist in ITFS, so there is no benefit derived from the window to offset the detriment. Another reason for window periods which does not pertain to the ITFS service is that in some other services, competing applications would be filed in response to an "A" notification for the primary purpose of simply delaying the installation of a new competitor by creating an MX situation.[29] As ITFS licensees will typically serve different and distinct audiences, no such factor is involved.

58. The "A" cut-off period will be 60 days. This is twice the length of time provided to file mutually exclusive applications in AM and television broadcast services,[30] but the additional time is necessary for the reasons cited above. This additional filing time will not be so long as to slow down appreciably the processing of the ITFS applications. A longer period for filing applications is not justified. Such a longer period would be further outside the normal processing time and consequently have a greater impact on processing speed. All parties will have had the same opportunity as the first applicant to assess the needs of the community and prepare an application, and the "A" cut-off period itself is not intended to guarantee an optimum planning schedule for parties who have not begun to act. The "A" list period will also mark the deadline for filing major amendments for and petitions to deny against applications on the "A" list. (*See*, 47 U.S.C. §309(d)(1)).

59. Other cut-off provisions will follow those for the AM and television broadcast services, including a 30-day period for the "B" cut-off, which will provide the opportunity for interested parties to file petitions to deny or minor amendments. Applicants on the "A" and "B" cut-off list will be permitted to file minor amendments to their applications until the "B" cut-off date, thus giving all applicants considered together the same deadline for filing minor amendments. Also, amendments will be permitted after the "B" list period for the purpose of keeping the applications current, under 47 C.F.R. §1.65, but no comparative advantage will derive from amendments filed after the "B" cut-off date.

60. A few commentors urge publication of notices of the filing of applications in local newspapers, and one proposes that new applications be sent by certified mail to all current licensees and permittees in the community where the facility is sought. One of the commentors suggests local publication only for nonlocal applicants. Publication of local notice

[29] *Report and Order* in MM Docket No. 84-750, FCC 85-125, adopted March 14, 1985.
[30] 47 C.F.R. §§73.3571(c) and 73.3572(c).

has not been required of ITFS applicants in the past. There has not been sufficient justification advanced to warrant the requirement that local notice be given or that all local permittees and licensees be individually served with applications.

61. Presently the ITFS rules do not define "major" changes in authorized or proposed facilities. In *Further Notice (83-523), supra,* the Commission proposed to continue its present practice of holding applications for new channels for a thirty-day period before action is taken. The few comments which addressed this issue suggest that the rules distinguish between major and minor changes, with minor changes processed immediately. It is suggested that proposing new channels or an increase in signal range be considered a major change, while those involving switching transmitters of the same power or changes only affecting technical operations (signal range not affected) be considered minor.

62. We have determined that applications or amendments to applications involving changes in facilities should be categorized; proposals to add new channels, change from one channel (or channel group) to another or increase power will be treated as "major" changes, and all others as "minor." A major change request will be subject to the A/B cut-off procedure. In cases where the Commission staff determines that an application (or amendment) which would otherwise be treated as a minor change should be considered a major change because of its impact on ITFS service, the applicant will be notified of the change in classification either within 15 days after it has been accepted for filing or within 15 days after the acceptance of any other application for ITFS facilities. Those applications (or amendments) which are not for new facilities or major changes in existing facilities will be routinely accepted for filing and subject to immediate processing.[31]

Petitions to Deny

63. Comments were invited in *Further Notice (83-523), supra,* concerning the filing and consideration of petitions to deny. Because there is no cut-off procedure, the Commission's current practice is to consider all petitions to deny filed prior to the day an application is acted upon (except those applications subject to the interim cut-off period). There was wide variation regarding issues that should be raised in petitions to deny. Some

[31] *Further Notice (83-523), supra,* n. 12, stated that applications for license renewal are to be filed four months before the expiration of the license term and will not be acted upon any sooner than 30 days prior to the expiration date. This filing requirement is applicable to most of the services administered by the Mass Media Bureau but is not specifically provided for in Part 74 of the Rules regarding ITFS. Section 74.15(e) of the Rules, which sets forth the license term for ITFS stations, will be amended to incorporate this provision.

parties suggest that petitions be allowed only for issues relating to misrepresentation of eligibility, to claims of interference by existing operators or noncompliance with other requirements to derogation of the primary purpose of ITFS, or to issues which mirror the broadcast standards (*e.g.*, raising issues relating to late-filed applications or failure to meet minimum programming requirements). One commentor would not accept petitions to deny from competing applicants under a point system, believing such conflicts should be handled under the point system mechanism.

64. As is the case for AM and television broadcast services,[32] petitions to deny will be accepted only during the A cut-off period against applications on the "A" list, and only during the B cut-off period against applications on the "B" list. Similarly, time periods for filing responsive pleadings will be 10 days for oppositions and 5 days for replies to oppositions. 47 C.F.R. §1.45. No persuasive reason has been advanced to restrict the issues that may be raised in petitions. Any relevant public interest question will be an appropriate subject for a petition. This will provide all interested parties an opportunity to be heard.

65. In the case of mutually exclusive applications, only those petitions which have been filed against the tentative selectee will be reviewed. When petition issues can be resolved in favor of the selectee, *i.e.*, no substantial or material questions of fact are raised, then the challenged applicant can be granted a license, assuming that the proposal(s) otherwise meets the requirements for grant. In instances where a petition to deny filed against the application of a tentative selectee raises a substantial question of fact, the application will be designated for hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended (47 U.S.C. §309(e)), and the administrative law judge will hold a hearing based only on those issues specified against the tentative selectee. If the evidence adduced results in the reduction of points or dismissal of the tentative selectee's application, the matter will be remanded to the Mass Media Bureau which will then reapply the point system to those remaining mutually exclusive applications. This procedure is consistent with other services which do not use comparative hearings to resolve MX situations. *See, Random Selection Lotteries II, supra* at 969, n.20; *Report and Order* in CC Docket No. 83-1096, 98 FCC 2d 175, 219 (1984).

Channel Limitations

66. The Commission requires each ITFS applicant to demonstrate the need for each ITFS channel it has requested. In *Further Notice (83-523), supra,* after recognizing that in the past it routinely granted four-channel

[32] 47 C.F.R. §§73.3571(c) and 73.3572(c).

requests and, in many instances, granted waivers of the four-channel limitation,[33] due to the abundant ITFS spectrum capacity and relatively light demand, the Commission noted the recent significant increase in channel requests. Consequently, it invited comment on the factors to be considered in a stricter assessment of the sufficiency of an applicant's demonstration of need for requested channels, and it adopted interim rules requiring the submission of proposed weekly schedules with a narrative justification, based on the schedule, for the channels requested to meet traditional ITFS programming proposals. *Id.* at para 37; 47 C.F.R. §74.902(c). At the same time, it determined to maintain the four-channel limitation in *Report and Order (83-523), supra* at para. 19.[34]

67. One commentor suggested that single channels are not valuable for ITFS service. However, the value of each channel will be a function of the specific need for ITFS service, and only such channels for which a need can be demonstrated to the Commission will be granted. Conversely, it is not practical to require all applicants to request and fully utilize one channel at a time before requesting others, as suggested by a few commentors, and it is not necessary where an applicant can concretely demonstrate the need for a multichannel system. Rather than attempt to anticipate and prejudge every conceivable justification which applicants may raise, the Commission will consider each case on an *ad hoc* basis. It will take into consideration such factors as the amount of use of any currently assigned channels and the amount of proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community. To this end, the Commission will continue to require the submission of the proposed weekly schedules for each channel requested and a narrative showing of need for each channel to meet traditional programming proposals. This justification per channel will be required of all applicants, as the Commission is as concerned with efficient utilization by all licensees, whether or not local and whether or not they are schools serving their enrolled students.

68. The Commission will not reserve one channel for the exclusive use of national ITFS operators, as proposed in *Further Notice (83-523), supra*, at para. 37. All other applicants are required to justify the use of each channel for which they apply, and there is no reason to treat national entities more leniently. Conversely, where national entities can demonstrate a need for a service they propose to provide (after the local priority

[33] 47 C.F.R. §74.902.

[34] That decision was affirmed upon reconsideration, with the Commission explicitly recognizing the same arguments that are repeated here regarding the desirability of multichannel ITFS systems, in *Memorandum Opinion and Order* in MM Docket No. 83-523, FCC 85-111, released January 15, 1985, at paras. 7, 8.

period specified in para. 21, *supra*), they will be permitted to apply for up to four channels, as is any other applicant who can justify the grant of each channel. In the interim, such a reservation is not necessary to ensure participation by national entities, as they have every opportunity to be involved as programmers, and do not need a channel reservation to preserve this position.[35] As such applications will be accepted and granted only after a period set aside for local applications, they will not limit the expansion of current operators or the application of other local entities in the near term.[36] As discussed in para. 19, *supra*, there is not sufficient reason to warrant the continued nonuse of channels indefinitely when a service can be provided by national entities.

Permissible Use

Essential Use

69. The ITFS spectrum is primarily intended for the transmission of formal education for schools, but current rules also allow the transmission of in-service training, professional development and other instructional and administrative programming, and use of the frequencies for ITFS relay stations. (*See*, 47 C.F.R. §74.931(a)-(d)).

70. In *Further Notice (83-523), supra*, the Commission noted that the demand for instructional programming for use in schools has increased significantly, especially at various non-school sites. It observed that while traditional ITFS licensees may be an appropriate source to satisfy certain of these demands, ITFS is not the only delivery system that can be, and is, utilized for such purposes. The Commission stressed that while ITFS is a proper and important adjunct to these sources, "the foundation of the service must continue to be that for which it was designed - the transmission of educational materials to accredited schools for the formal education of students enrolled there." *Id.* at para. 8. It recognized that "this kind of [educational] programming is not traditionally provided by other outlets and the specialized and unique audience served is one whose very important needs could too readily be ignored if ITFS stations were permitted to transmit their programming to any location of their choosing. . . ." *Id.* Accordingly, the Commission proposed to maintain the specific requirement to transmit formal educational programming to enrolled students in accredited schools. However, whereas the current rule required that the "primary" use of any ITFS facility be for formal in-

[35] See para. 20, *supra*.

[36] Licensees or applicants seeking more than four channels for a particular system are required to submit a showing in support of a request for waiver of the four-channel limitation rule. The waiver burden is high, particularly in areas where a large demand for channels exists. *Report and Order (83-523), supra* at para. 19; *aff'd., Memorandum Opinion and Order (83-523), supra.*

school educational programming, implying such use for a majority of the time in operation, the Commission proposed that it may be sufficient to require only that formal in-school educational programming be an "essential" use of each authorized channel. *Id.* at para. 9.

71. Comments were invited on whether to codify the essential use standard, whether the standard should be quantified so that a certain number of hours of formal education would be delivered on each channel, whether the same standard should apply to entities not proposing to serve their own in-school formal educational needs, and whether those programs delivered to homes for academic credit should qualify as essential use programming.

72. A few commentors support the essential use standard as proposed. One directly reasons that since the classroom remains the primary vehicle of education, it deserves at least some attention on each channel, and that the requirement is only minimally restrictive because it does not preclude other forms of programming. The Instructional Telecommunications Foundation recommends that one-third of each channel be set aside for essential use. The Archdiocese of Detroit prefers a minimum essential use of one hour per weekday, applied on a per-system basis in case an operator needs the capacity of a whole channel to serve informal programming to a certain site. Others favor some quantification of the rule but do not specify any number of hours. Those who specifically oppose any quantification of the essential use standard cite the licensees' need for flexibility in scheduling formal programming because programming demands differ among communities. Another group suggests a minimum of educational programming (6 hours per weekday), subject to a waiver based on "unique local needs." Most who favor the essential use standard believe it should apply to all entities, including those who do not serve their own in-school needs. Some argue that holding only certain applicants to the standard would create an artificial distinction, since all applicants should be prepared to deliver formal educational programming.

73. Many commentors oppose the essential use standard altogether, variously contending that the Commission should not dictate which forms of programming are more important than others; that all forms of educational and instructional programming are valuable to society; and that applicants should be encouraged to serve the needs of the whole community, not just the needs of schools. Most insist that the unique value of ITFS lies in its ability to reach beyond school walls. They assert that formal education is increasingly demanded at businesses, health care facilities and training centers. Thus, they conclude restricting essential use programming to schools is an artificial distinction which may actually harm the growth of ITFS. They contend that the Commission's regula-

tions should focus on the quality of the service, not on the buildings where the service happens to be delivered.

74. Predictably, the same majority of commentors also believe that if the Commission does adopt an essential use standard, it should be broad enough to include formal education delivered to homes. A few of the larger groups point out that there are parents, elderly, homebound persons, and other groups with limited time and money for education who cannot do their learning anywhere but at home. One hospital television network would regard formal, in-home use as essential, but not allow an applicant to propose all of its essential use programming in the form of in-home education because of the difficulty of demonstrating the demand for such programming at the application stage. A few parties oppose in-home essential use on the grounds that formal educational programming belongs exclusively in schools. One party states that in-service training for teachers and school administrators should qualify as essential use programming because of its immediate relevance to the formal education of students.

Discussion

75. The clear and guiding principle in this consideration is that the primary purpose of ITFS was at its founding and remains to serve formal academic needs. Thus, an essential use standard is vital, particularly in light of the numerous other corollary uses which are being authorized for the service. Although many commentors insist that the Commission should not stand in the role of an educator and decide what programs are truly instructional, the Commission must use some guideline to distinguish between fundamentally instructional programming and informational, cultural, entertainment and other programming, in order to preserve the essential nature of the service. An essential use standard accomplishes that by requiring a showing that some of the programs in a given proposal are offered for credit towards an academic degree or diploma, while putting the responsibility for deciding what is educational not on the Commission, but on the accrediting institutions, where it rightly belongs. Therefore, every ITFS system will continue to carry formal educational programming for credit for students enrolled at accredited schools.

76. The argument that a unique and significant value of ITFS lies in its ability to reach beyond school walls is persuasive. In this respect, it is imperative to focus on the purpose of ITFS, which is not so much to serve school buildings as to serve students and schools, satisfying the demand for televised formal education. Therefore, geographic restrictions on the sites to which an operator chooses to deliver formal programming are not appropriate. Programming offered for credit to enrolled students of an accredited school will be recognized as formal educational programming,

satisfying the essential use standard, whether it is delivered to schools, businesses, homes, or any other sites.

77. Given that formal education is the cornerstone of the ITFS service, the concern of many commentors over the verifiability of the legitimacy of service provided exclusively to nonschool sites is apt.[37] That concern is readily resolved, however, by requiring all ITFS applicants that do not list schools as receive sites to furnish detailed information about the essential use component of their systems, naming the schools and the degrees or diplomas for which the formal programming will be offered, and describing the administration of the courses. Written verification regarding each of these points will be required from each school.[38]

78. Applicants listing only cable headends as receive sites have been "required to show that one use of the cable system will be to distribute educational and instructional programming to schools and other appropriate ITFS users." *Report and Order (83-523), supra* at para. 13. To make this showing, such applicants which serve schools should name the schools. Those which serve non-school sites should provide the essential use information requested above in para. 77, *supra.*

79. ITFS use by health care facilities requires special consideration. The Pennsylvania Hospital Television Network took the lead in explaining that hospitals offer many academic courses to train their personnel for license exams, as opposed to university degrees, which should qualify as "education" for ITFS purposes. States (and private organizations) license many professionals and the Commission is not equipped or inclined to examine which courses of training are sufficiently academic to be deemed "formal education."[39] Hospital training, however, demands particular attention. Judging from Pennsylvania Hospital's comments, healthcare instruction is a field with rapidly growing demand. Furthermore, the medical sciences unarguably serve urgent community needs. Teaching hospitals, which offer formal programming to medical students, have already become ITFS licensees and have generally proven themselves as effective educators. Hospitals are unique institutions in providing this specialized ITFS service. Significantly, hospitals serve a very specialized audience, and are therefore inherently disadvantaged, compared to other educational organizations, which can serve all levels and disciplines of

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[37] Commentors are specifically concerned that those licensees which are not educational institutions and which list no schools as receive sites may neglect to ascertain the demand for the formal education programming offered on their systems. They fear that offerings of those licensees which are educational institutions claiming to serve only their own off-campus students, may well comprise continuing education courses.

[38] The verification must be written or signed by an administrator or authority who is responsible for the school's curricula.

[39] Professional training, whether for certification or maintaining currency, is already a permitted use for ITFS frequencies. 47 C.F.R. §74.931(b).

education. Any regulation that requires a category of programming that is not normally used in hospitals may effectively render hospitals ineligible for ITFS licenses. Although many hospitals offer academic courses to staff members, such as radiologists or registered nurses, for training toward state license exams, they do not award academic degrees and generally may not provide "formal" education in the traditional sense of the word. Thus, the requirement that all applicants must deliver some formal education for academic credit to enrolled students could disqualify a hospital's proposal. This is not a desired result of the requirement. So long as hospitals remain eligible for ITFS licenses, the definition of essential use programming will incorporate the specialized formal education that hospitals provide, and will regard as essential use programming any medical science courses offered by hospitals to their staffs as training for state licenses. (Other hospital programming, such as medical instruction for patients, will not meet the essential use standard.) In contrast, in-service training for teachers and school administrators is not so regulated by a licensing authority. Neither do schools suffer the same handicap as hospitals in achieving basic eligibility. Thus, such in-service training for teachers and school administrators will not be included as essential use programming, but will continue to be viewed as a secondary ITFS use.

80. No reason has been advanced to exclude from the application of the essential use requirement any particular category of ITFS licensee. The essential use rule reflects the most important function of the ITFS service and will be applied to all licensees, including those who do not serve their own in-school needs. Those licensees may have the least incentive to maintain the focus of the ITFS service. The modification of the rules to permit exclusively nonschool reception to satisfy the requirement should eliminate the compliance burden for any such licensee providing a recognized ITFS service.

81. The amount of essential use programming offered on a given system, depends upon many factors. School districts, hospitals and universities have very different scheduling needs for formal education, and a set number of hours per day or per week that all various operators can or should devote to essential use programming cannot be fixed. Because of these differences, some commentors would prefer not to quantify the essential use standard. But the Commission has already seen proposals that relegate formal programming to a small portion of one channel. At a time when ITFS channels are increasingly scarce, a policy that grants many channels for entirely non-essential purposes cannot be justified. Therefore, every channel requested must contain at least some amount of essential use programming. Specific quantification is neither practicable nor necessary. The Commission is loathe to substitute its judgement for that of educators. Existence of the essential use standard

will ensure the introduction of either receive equipment at school sites or an administrative program to manage off-campus use. With either system in place, the demand for programming should dictate the particular amount of programming dedicated to various uses.

Substantial Use

82. ITFS licensees who wish to use or lease airtime (their "excess capacity") for non-ITFS purposes are currently required to use each channel for ITFS purposes for a minimum of 15 hours per week between 8:00 a.m. and 10:00 p.m., Monday through Friday, excluding holidays and vacations. *Memorandum Opinion and Order on Reconsideration* in Gen. Docket 80-112, 98 FCC 2d 129 (1984); 47 C.F.R. §74.931(e). This minimum was established to insure that a "significant portion" of each channel would be used for ITFS purposes.[40] *Memorandum Opinion and Order (80-112), supra* at para. 24. In *Further Notice (83-523), supra,* the Commission reiterated its concern for preserving at least a minimum amount of time on each channel for ITFS purposes, and solicited recommendations on how many hours operators should devote to ITFS programming before using or leasing a channel for non-ITFS purposes. *Id.* at para. 10.

83. Comments were invited on whether any minimum hour standard should be applied on a per-channel basis and whether it should apply per day or per week, and whether the specified minimum amount of "substantial use" programming should include a separate standard for essential use (formal) programming. Information on ITFS programming schedules prior to the excess capacity usage provisions of *Report and Order (80-112), supra,* was specifically solicited. In connection with the considerations on licensee control, the Commission also solicited comments on whether ITFS lessors should be entitled to recapture or reserve airtime on any leased systems in order to meet changing ITFS needs as they arise. *Further Notice (83-523), supra* at para. 23.

84. Only a few commentors would preserve the rule roughly as is, arguing that it strikes a good balance between allowing the applicant flexibility in leasing and discouraging those applicants with primarily commercial goals. The vast majority of parties who commented on the issue request an increase in the number of hours of "permissible use" programming required to constitute a substantial use, freeing excess capacity for non-ITFS use. Most of those recommend doubling the current requirement to at least 30 hours per week. Complete elimination of the requirement received virtually no support.

85. Other approaches are also suggested. One idea is to stretch the bracket from 7:00 a.m. to 11:00 and over weekends, in order to include

[40] This includes all permissible ITFS uses, not just those qualifying as essential use.

more informal educational programming. One party suggests that the time frame for colleges should extend even later at night, presumably because college students study later at night. A few others push for a standard based on ratios; *i.e.*, for every hour of commercial programming offered by the lessee, the lessor would have to transmit a given amount of ITFS programming. This, they contend, would give applicants more bargaining power in dealing with prospective lessees, provide needed flexibility in scheduling, and, most importantly, promote the expansion of ITFS programming in direct proportion to the expansion of commercial programming. The University of Maryland advocates a unique proposal, which would require either three hours per channel per day or a phased-in minimum of 50% of the licensee's "normal weekly hours of business," whichever is greater. They propose that this would allow new operators to start small but still require them to grow, depending on their academic demand.

86. Most commentors insist that any standards should be applied on a per-channel basis to prevent "channel loading" — the practice of concentrating all of the required hours of ITFS programming into one of the multiple channels operated, to free others for full-time, non-ITFS use. The few commentors seeking a per-system standard cite the need for flexibility in scheduling. The MDS Industry Association explains that MDS support of ITFS depends critically on the licensees' freedom to devote an entire channel to compete with 24-hour video entertainment services.

87. A majority would also apply to the standard on a per-day basis, instead of the existing per-week basis, to protect against the loading of ITFS programming into one or two days and the concomitant threat that commercial interests may dominate the licensees' scheduling decisions. The few parties seeking to retain the per-week standard repeat the perceived need for scheduling flexibility.

88. Few parties considered whether any portion of the substantial use minimum should consist of formal education. The National Association of State Universities and Land Grant Colleges contend that 20 percent of the substantial use programming should be formal, and Iowa State University of Science and Technology calls for a 20 to 25 percent minimum, implying that leasing applicants may be less motivated than others to serve formal education needs.

89. The majority of commentors favor some mechanism that would afford licensees the room to increase hours of ITFS programming over time. Many add that any right of recapture should be "qualified" so that the MDS operator could receive "reasonable compensation" for any hours it must return to the licensee. The Network for Instructional Television

considers the recapture provision "unnecessary" as long as the Commission would reserve part of the system's total capacity for ITFS purposes.

Discussion

90. A minimum "substantial use" for ITFS service will be required on each ITFS channel before it can be used for non-ITFS purposes, whether by the licensee or a lessee. Such a requirement is an elementary necessity to guarantee the intended use of ITFS channels in the face of the revenue-generating uses which will also be permitted. Also, non-ITFS use is typically omnidirectional and at maximum allowable power, which generates the maximum impact on the availability of ITFS facilities to others.

91. A fundamental element of this service requirement will be an allowance for some of the required ITFS airtime which cannot be put into immediate service due to a licensee's limited resources or demand to be "preserved" for use at a later time. This preservation can be accomplished either by a strict reservation of airtime for ITFS use only or by the retention of power by the licensee to readily recapture, without detriment, sufficient airtime to fulfill the requirement. This preservation element will enable and encourage the emergence of new entrants that might not be able to start with a full schedule of ITFS services. It thus prevents a responsible and realistic "substantial use" requirement from freezing out smaller or less developed licensees, while advancing responsible use of the spectrum for ITFS purposes. This allowance combines the best features of both a strict reservation and a simple recapture approach. By applying only to a specified number of hours, it provides a definite framework for a prospective lessee to evaluate airtime availability and plan its involvement in leasing ITFS channels. By permitting use of the time by a lessee, subject to recapture conditions, it prevents the unnecessary waste of valuable airtime. By specifying that recapture of this time must be readily available and without detriment to the licensee, it avoids any obstacle or disincentive for licensee use for expanded ITFS service.

92. The ratio scheme proposed would likely prove counterproductive. If the amount of commercial programming is limited by the amount of ITFS service offered on a system, a lessee (or licensee) may be encouraged to fund more ITFS programming, as suggested. But more likely, a new ITFS operator may not have produced enough programming, or may not have enough demand for the programming, to air many ITFS hours in the first few years. Without such ITFS service to offer, it would be hard to attract an MDS partner willing to operate only a few hours. Further, leasing only a few hours, even if accomplished, would not generate much leasing revenue. Meanwhile, the unleasable hours would remain unused for any purpose. An equally undesirable result would be the inclusion of ITFS programming for the mere purpose of increasing commercial use and without regard to its "educational" function. These

are clearly not desirable results, and the possible benefits to be derived from this approach are not sufficiently compelling to recommend it.

93. The typical public school, according to the comments, is open from 8:00 a.m. to 4:00 p.m., Monday through Friday, or 8 hours per day. Commentors did not respond to the request for data of actual use prior to *Report and Order (80-112), supra,* but several assert that ITFS licensees typically offer programming throughout the eight hour school day. A study submitted by the Corporation for Public Broadcasting[41] indicates that school districts using ITFS typically deliver 8 hours of formal educational programming per weekday per channel (40 hours per week), while colleges and universities air formal programming anywhere from 12 to 16 hours per weekday per channel (60-80 hours per week). A survey of applications by new applicants currently on file reveals an expectable variation in the proposals by all categories of applicants. The average number of proposed ITFS hours is 53 per channel, per week and the median proposal is 50 hours per channel, per week. The two categories of applicant with the lowest average, licensees of noncommercial educational television stations and archdioceses, propose 41 and 49 hours, respectively; all other categories average over 55 hours. Well over half of the proposals are in the range of 40 - 60 hours per channel per week, with several proposals over 90 hours. Only a few of the surveyed applicants propose fewer than 35 hours per channel per week. Notably, virtually all of the surveyed applicants will attain their service levels without the benefit of revenue generated by non-ITFS use.

94. These proposals provide some guidance on appropriate and reasonable minimum use levels for effective ITFS operations. In fact, an operator generating revenue with non-ITFS use (or receiving free system equipment) might be expected to produce a fuller schedule. However, one of the most important purposes of this proceeding and rules development has been and continues to be the initiation of new service by qualifying parties whose needs and/or abilities may not be represented by systems and operations in use and on file. Such applicants can be expected to use or lease excess capacity for non-ITFS uses to generate funds to initiate ITFS systems. They may well not be able to produce many hours of programming per day, and may need to use or lease more non-ITFS hours in order to raise sufficient funding for their programs. Accordingly, a substantial use standard will be set at a level somewhat lower than those proposed by commentors and adopted by almost all current applicants. It will include a preservation provision (see para. 91, *supra*), so that if expansion ability is maintained to a certain level by reservation or ready recapture of airtime, service can be initiated at an even lower level of

[41] C. G. Arnall's *Instructional Television Fixed Services: an Analysis of ITFS Operations* (CPB: 1984).

operation. No compelling reason has been advanced to permit extreme day-loading or channel-loading,[42] but some flexibility is appropriate to recognize the day-to-day variety in the functioning of educational institutions.

95. On each channel, licensees will be required to provide at least three hours of ITFS programming per weekday (Monday-Friday), with an additional five hours per week distributed during the week at the licensee's discretion, for a total of twenty hours per week, excluding holidays and vacations, minimum current use on each channel. This represents an increase of only five hours per week over the existing standard. While opening the door to new applications in this way, the intended use of the spectrum will be preserved by requiring that a minimum of forty hours per week, excluding holidays and vacations, must be dedicated for ITFS programming on each channel, so that if only twenty to thirty-nine hours can be currently programmed, additional hours will be reserved or subject to ready recapture. The dedication must include at least six hours per weekday, with the remaining ten hours distributed at the licensee's discretion.[43] Any hours specified for ITFS use must, of course, be appropriate to the receive site. If the only qualifying receive site or sites is in operation fewer hours than would satisfy the substantial use standard, a waiver can be requested. Monday - Friday use must continue to occur between 8:00 a.m. and 10:00 p.m. ITFS programming between 8:00 a.m. and 10:00 p.m. on Saturday will be added to programming qualified to meet this requirement.[44] These requirements do not eliminate the need for licensees to maintain some recapture power over other times to adjust to their programming needs. This issue is further addressed in para. 104, *infra.*

96. It is not necessary to build a formal education requirement into the substantial use standard. The essential use rule already requires all licensees, including lessors, to deliver at least some formal education on each channel. This will necessitate the installation of receive equipment or appropriate administration, so that essential uses will not suffer from extrinsic considerations related to delivery costs. Beyond that, licensees must be permitted to use their discretion in responding to individual needs. Therefore, all ITFS programming, formal and informal, will count towards the substantial use minimum.

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[42] Current leases have no provision for a 24-hour channel, in contradiction of MDS Industry Association's assertion that such a channel is necessary for successful MDS operation.

[43] It is notable that compliance with these standards is further eased by the expansion of the definition of "permissible use" programming which will meet this qualification.

[44] Saturday classes and schedules are common for many schools and other educational facilities, especially for continuing and professional education. Furthermore, there is no likelihood that this provision will be used to load programming to circumvent intended ITFS use, as it is one of the more desirable periods for commercial programming.

97. These requirements will be applied only to licensees, current and future, that use their "excess capacity" for non-ITFS purposes. We presume that the motives of applicants not leasing excess capacity for commercial purposes are purely educational and that the demand is sufficiently great, whether in amount or in nature, to justify the costs of construction and operation. These applicants will provide as many hours as possible of both formal and informal ITFS programming. Therefore, there is no reason to dictate how many hours of programming they must provide. Prospective licensees which cannot meet the established standards but wish to lease should consider the feasibility of merging or sharing facilities with others whose needs are similarly slight, as proposed by several commentors.

Licensee Control

98. When it permitted ITFS licensees to use their excess channel capacity for non-ITFS purposes either by themselves or by leasing to other parties, the Commission predicted that licensees would limit their excess capacity in order to protect their own growth requirements, and therefore no regulations that would restrict the lease negotiations were established. *Report and Order (80-112), supra* at 1252. The Commission subsequently noted that the lease agreements contained in numerous pending applications filed in response to that provision would place many of the licensees' responsibilities in the hands of their proposed MDS lessees. *Further Notice (83-523), supra* at para. 22. Specifically, the agreements would allow the MDS party to finance, design, construct, operate and own the physical plant, as well as lease large portions of airtime on the system. The Commission acknowledged that leasing inherently involves some sharing of licensee control and that ceding certain powers to the MDS lessee, such as the responsibility for construction, could serve the best interests of both parties because of the greater technical expertise which MDS operators generally have. *Id.* at para. 23. While comments were invited on how the powers of licensee control should be allocated among the leasing parties, the Commission indicated an inclination to impose minimal restrictions on the construction, operation, and ownership of facilities, so that the negotiating parties would be free to arrive at terms on their own best judgment.

99. Many commentors argue that an ITFS licensee should maintain absolute control over the construction, operation and ownership of its station. According to some, absolute control means the licensee must construct, operate and retain title to the facilities. Otherwise, they fear, the ITFS spectrum would soon be threatened by a "*de facto* reallocation" to MDS use. According to others, absolute control would not prohibit the delegation of tasks as long as the licensee directs and supervises the work to insure that the changing needs of the educational community will be

met. Still others contend that absolute control over construction merely means the licensee must reserve a right of approval for any construction work performed by the lessee.

100. A greater number of parties, however, see no need for new rules governing control. Some explain that the rapid changes brought on by leasing make it impossible or inappropriate to formulate standards just yet, as leasing is still experimental. Others further assert that if the Commission would adopt strict eligibility rules, it could leave the area of licensee control unregulated, because leasing would then be performed only by responsible licensees. These parties regard leasing as a "cooperative relationship" in which the tasks of construction, operation and ownership are best left to the commercial operator who has greater resources and technical expertise. They would have the Commission review any licensee control and real-party-in-interest questions on an *ad hoc* basis and designate issues for hearing where necessary. This way, each applicant could tailor a lease to its own unique needs and the Commission could address any control problems in light of the "totality of the circumstances."[45]

101. Specific rules regarding leasing and control will not now be adopted. As argued, it would be difficult to fashion standards for leasing while the practice is still in an experimental stage. Only a few different examples of leases are in evidence thus far as only a few MDS operators have entered into lease agreements. Future leasing parties may choose very different approaches, and future innovation should not be discouraged.

102. The comments confirm that leasing inherently involves compromises. In exchange for building an ITFS station and funding its operations, an MDS lessee must expect to gain access to a certain minimum of airtime to make its investment in the ITFS system worthwhile. This trade-off was recognized in *Further Notice (83-523), supra*, at para. 23, and accepted when non-ITFS use of excess capacity was first considered and permitted. The ITFS proposals cater to a wide variety of community needs, and the permissible use and substantial use rules established in this proceeding will ensure that a substantial amount of programming is devoted to ITFS purposes on every channel before non-ITFS use occurs. In addition, the eligibility rules and comparative criteria formulated in this document will promote the licensing of the most responsible educational bodies.

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[45] Commentors note that the Commission generally considers the totality of circumstances to ascertain where actual control of a station resides, citing *Mutual Radio of Chicago, Inc.*, 55 RR 2d 1577, 1583 (1984) and *George E. Cameron, Jr., Communications (KROQ)*, 91 FCC 2d 870; 52 RR 2d 455 (1972).

103. Because licensees will be required to maintain sufficient programming control to meet their needs, many other tasks may be performed by an excess capacity lessee. As the commentors stress and the Commission has recognized, MDS lessees commonly have more engineering and operations expertise than their ITFS counterparts. Also, as Microband Corporation of America ("Microband") points out, they can usually accomplish construction and operation/maintenance considerably more economically, at only marginal expense, due to their in-place structure. Operation of facilities by lessees is not necessarily inconsistent with the performance of an ITFS licensee's responsibilities, and no actual harm has been demonstrated by commentors. Broadcast licensees often lease facilities owned by other parties with no significant loss of control; no greater loss of control need occur when an ITFS physical plant is leased from an MDS operator. Furthermore, as Microband also points out, there are tax advantages in ownership that accrue to an MDS operator, which can be reflected in lease payments, which would not be as advantageous to most ITFS licensees. These considerations all presume that licensees will continue to be held ultimately responsible for full compliance with all Commission rules, and that both real-party-in-interest and licensee control complaints will be reviewed on a case-by-case basis. How ITFS licensees arrange to retain their ultimate responsibility will be left to their best judgment.

104. Any review of excess capacity leases will therefore place primary emphasis on the licensees' programming control. Provisions which assign exclusive rights to a lessee can also be scrutinized. For example, a representative contract on file with the Commission between a proposed MDS lessee and applicants for ITFS facilities provides that the lessee may select the station's transmitter site "in its sole discretion." This would appear to be inconsistent with the responsibility of the ITFS licensee to ensure the adequacy of its service. Overly restrictive programming arrangements which would effectively prevent the licensee from responding to changing needs would also bear scrutiny.[46] The rights of a licensee in the event its needs are not met, and specifically its rights of transfer or assignment and its rights and obligations upon termination of the contract can also bear consideration. We do expect that where such clauses are used, the applicant will submit an accompanying narrative to the Commission explaining why the provision is necessary and consistent with

[46] The preservation provision of the substantial use requirement, para. 95, *supra*, is the primary means of providing the capacity to meet expanding needs. While this bedrock protection of 40 core hours of airtime may permit the acceptance of stricter rescheduling provisions, more protective of the lessee, than could otherwise be tolerated during remaining hours, an ITFS licensee cannot surrender all future rights to adjust to changing needs.

the licensee's fulfillment of its responsibilities. We will review such clauses in light of all prevailing circumstances. Also, since a license to operate authorized facilities runs for a period of ten years, any lease arrangements involving those facilities cannot exceed that period.

105. Applicants for new stations or for modifications in existing facilities will continue to be required to submit copies of lease agreements with their applications. Also to assure compliance with rules and policies pertaining to leasing arrangements, existing operators who begin to lease out excess capacity on authorized facilities will also be required to submit copies of their leases to the Commission. At this stage in the development of ITFS, this material is needed to monitor the new policies adopted herein. As experience develops, these requirements may no longer be necessary.

106. We believe this method of monitoring ITFS lease agreements precludes the need for other safeguards suggested by some commentors. In deciding to handle licensee control complaints on a case-by-case basis, we need not require all leasing parties to hire separate legal counsel, to disclose their financial ties or to limit the lease term to only a few years, as suggested by some commentors. Prohibiting an MDS operator from simultaneously contributing capital and leasing air time on the system, as suggested by one commentor, would frustrate the purpose of excess capacity leasing.

Technical Standards

107. *Further Notice (83-523), supra*, proposed to amend the Rules with regard to the technical requirements applicable to ITFS. In order to maximize compatibility and interoperability between ITFS and MDS, the Commission proposed ITFS technical standards that were very similar to the provisions adopted for MDS in the *First Report and Order* in General Docket 80-113, 98 FCC 2d 68 (1984) (hereinafter "*Technical Standards Order*"). *Further Notice (83-523)* proposed rules for ITFS which would govern matters relating to interference. The proposed rules addressed cochannel and adjacent channel interference standards, a standard receiving antenna, and a protected service area. The Commission also proposed to examine ITFS matters which, because of the nature of the service, may require different technical standards from those applied to MDS. Seventeen entities submitted comments and reply comments in response to the technical standards proposed.

108. Historically, ITFS has successfully relied upon informal coordination between operators to anticipate and resolve interference problems. However, a large number of new proposals and formal petitions alleging interference have been received; therefore the informal coordination procedure has recently become less successful. The Commission strongly supports continuation of such coordination procedures among the ITFS

community to resolve potential interference problems. Such effort would reduce the burden on the Commission's staff and would promote more efficient utilization of the spectrum.

109. The rules adopted below are not meant to replace the coordination process, but rather to provide a means of adjudication in situations where informal coordination attempts have failed. Since the ITFS technical standards proposed in *Further Notice (83-523)* have already been addressed in great detail in the *Technical Standards Order*, we will address the rules with some modifications that we are adopting as they apply to ITFS.[47]

Cochannel Interference

110. The MDS rules, as adopted in the *Technical Standards Order*, specified a 45 dB cochannel protection ratio (*i.e.*, the difference between the desired signal and the undesired signal must be 45 dB at the receiver antenna terminals) for stations operating in the same geographical area. The 45 dB ratio was established on the basis of extensive tests conducted by the Television Allocation Study Organization (TASO), in which actual television pictures, subjected to various levels of interference, were compared by a panel of viewers. *Further Notice (83-523), supra*, proposed that 45 dB be utilized as the standard protection ratio for ITFS.

111. The comments and reply comments received were overwhelmingly in favor of establishing 45 dB as the cochannel protection standard. Most commentors agree that 45 dB represents a reasonable compromise between available signal quality and possible preclusionary effects. Some commentors, however, believe that the 45 dB ratio, while adequate for entertainment programming, may be insufficient for detailed course work (*e.g.*, schematic diagrams, mathematical formulas, etc.).[48] Cochannel protection ratios up to 55 dB are offered as being necessary to protect such ITFS programming.

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[47] It should be noted that the proposed rules did not contemplate changing the technical standards applicable to Private Operational-Fixed Microwave Radio Service (OFS) stations licensed on the three 2.5 GHz channels allocated for private use. However, the Part 94 rules governing the operation of OFS stations currently incorporate by reference some of the technical standards contained in Part 74. We are taking the opportunity in this *Second Report and Order* to incorporate in Part 94 all of the rule provisions applicable to OFS stations licensed at 2.5 GHz. In so doing, we are merely extracting applicable technical standards currently contained in Part 74 and inserting these standards into Part 94. No new rules are being adopted relative to OFS stations. The ministerial change does not affect the substance or scope of the rules and is authorized, without notice and comment rulemaking, pursuant to Section 553(b)(3)(A) of the Administrative Procedure Act. 5 U.S.C. §553(b)(3)(A). These rule changes are included in Appendix B.

[48] See comment of University of Maryland, page 92, and George Mason University at page 125.

112. The level of cochannel interference that viewers will find unacceptable is dependent upon the nature of the material being transmitted. As mentioned in the MDS *Technical Standards Order*, TASO results revealed that scenes with more detail are more likely to be perceived as having unacceptable levels of interference than are scenes with less detail. However, there is no conclusive evidence on record to justify selection of any protection ratio greater than 45 dB. Further, no data has been submitted to adequately document that 45 dB is insufficient for the transmission of very detailed material. For these reasons, 45 dB will be adopted as the general cochannel protection ratio for ITFS. Should isolated situations occur where the 45 dB cochannel protection ratio is not sufficient, and all informal coordination attempts between the involved parties fail, the Commission will consider more stringent protection ratios on a case-by-case basis, provided that detailed confirming data is submitted. Such a confirmation showing would consist of test data similar to that provided in the original TASO report. The applicant or licensee must clearly demonstrate that the 45 dB ratio is not sufficient protection for the service being proposed or provided. It must be emphasized that licensees and applicants are expected to cooperate fully in attempting to resolve problems of this nature before bringing the matter to the attention of the Commission.

The Standard Antenna

113. In the *Technical Standards Order*, a standard (reference) antenna was specified for the purpose of interference calculation. The reference antenna adopted had characteristics generally associated with those of a 2-foot parabolic reflector antenna. *Further Notice (83-523)* proposed to utilize the same standards for interference and other calculations in ITFS.

114. This proposal received mixed support from commentors. Those in opposition allege that the proposed 2-foot parabolic reflector is not a representative model of antennas utilized in ITFS. The vast majority of ITFS receive sites, they argue, use antennas of far better quality than the proposed model and an allocation system utilizing the reference antenna exclusively would stifle ITFS expansion by overprotecting most receive sites. The University of Maryland points out that parabolic reflectors of less than 4 feet were seldom used in their installations and that more often 6, 8 and even 10-foot antennas were utilized. Several commentors express, in effect, that they support the reference antenna provided that alternate engineering showings are permitted utilizing the actual antenna characteristics when necessary to demonstrate the absence of interference.

115. The proposed standard antenna would indicate the worst case study. However, the primary reason for proposing the 2-foot standard

antenna was to enable the Commission staff to expedite technical processing of ITFS applications by easing the administrative burden caused by examining individual receive site antennas. We believe that the reference antenna selected is a reasonable choice for this purpose. It should be remembered that this antenna is selected as a reference and not a requirement. Therefore, the rules will be amended to include the standard antenna adopted in this Order. The Commission shares the concerns of many commentors, however, that in many cases, overprotection of existing ITFS stations would preclude future expansion if the 2-foot standard antenna were used exclusively. There is merit in the suggestion that, while adopting the characteristics of the proposed antenna, an alternative showing of noninterference based upon the characteristics of the actual antenna in use at the receive site under consideration should be accepted. Therefore, an alternate engineering showing will be accepted provided that it includes such technical details as the make of the receive antenna, type and gain, model number, and the co-polar and cross-polar gain patterns used in the interference calculations. It is emphasized that the burden of establishing noninterference lies with the applicant and absent the necessary technical information, the Commission staff will utilize the reference antenna for its engineering determinations. This compromise will ensure the protection of ITFS receive sites without risking the preclusive effects resulting from overprotection. Further, the Commission's resources will be more efficiently utilized since the time consuming task of receive site analysis, when necessary, will be performed by the applicant, the party seeking the benefit to be derived from this analysis.

Analysis of Potential Interference

116. *Further Notice (83-523)* proposed to adopt requirements in ITFS for an interference analysis similar to those adopted for MDS in the *Technical Standards Order*. It recommended that each application include an engineering study of all transmitters located within a 50-mile radius of its proposed transmitter site. This recommendation has the strong support of most commentors. Some commentors suggest that the study should be increased to 65 miles. The Archdiocese of Detroit, Macomb Intermediate School District and the Oakland Schools expressed their desire for the study to also include an electrical height analysis.

117. ITFS processing experience confirms that 50 miles is a reasonably conservative distance for the vast majority of antenna heights utilized in the application of ITFS. Therefore, the 50-mile radius requirement will be adopted and the rules will be amended to require applications for new and major changes to include an analysis of the potential interference. In addition, any petitions to deny alleging interference, must, in like manner, include such an analysis, or the petition will be

dismissed. Therefore, each application must include an exhibit of the potential for harmful interference to all existing and previously proposed cochannel and adjacent channel operations located within 50 miles of the applicant's proposed transmitter location. Because interference is likely to occur at greater distances, when very tall transmitting towers are utilized, each application must also include an analysis of the potential for harmful interference with any authorized or previously proposed cochannel station to which the proposal has an unobstructed electrical path to any existing or previously proposed receive site. The practice of serving such engineering studies on all licensees, permittees, and applicants of pertinent stations considered in such exhibits is encouraged. This practice would involve very little additional effort on the part of the applicants since these stations are part of the required engineering analysis, and would encourage more active communication and coordination among the ITFS community. This procedure may increase the likelihood of resolving disputes through informal coordination, which would expedite the processing time of such applications filed with the Commission.

Equivalent Isotropically Radiated Power (EIRP)

118. *Further Notice (83-523)* requested comments on amending the rules to specify the power in terms of the limited EIRP rather than transmitter power output. It also proposed to limit the radiated power of a station using an omnidirectional antenna to a maximum of 33 dBW (2000 Watts) EIRP. This is equivalent to a 100 Watt (20 dBW) transmitter operating into an antenna with 13 dB gain, assuming no line losses. Further, a formula was proposed to calculate maximum EIRP limitations in cases where directional transmitting antennas are utilized.

119. The comments received on this issue were inconclusive. Some commentors oppose the maximum EIRP proposal, contending that ITFS should continue with the practice of utilizing no more power than necessary to reach specified receive sites, thus minimizing preclusionary and harmful interference effects. Of those in general agreement with the proposed power increase concept, the majority favors a cautious case-by-case approach as opposed to a unilateral across-the-board power increase. Microband, for example, favors provisions for increasing EIRP but is concerned about potential interference. Similarly, comments from the Archdiocese of Detroit and Macomb Intermediate School District, and the Oakland Schools express general approval of the proposal as a reasonable maximum, but express concern that it may promote the use of higher power than necessary to perform the general application of ITFS. They suggest that applicants for power increase be required to submit a demonstration of need. The majority of the commenting parties seem to agree that, if power increases are allowed, such applications must include an engineering analysis of potential interference.

120. Based upon the comments received on this issue, no substantial need is established at this time to amend the rules to permit an overall 33 dBW EIRP increase for ITFS. Generally, the present 10-watt transmitter power output appears sufficient for the majority of ITFS licensees. Provisions for obtaining higher operating power are specified in Section 74.935(b) of the Rules. 47 C.F.R. §74.935(b). Accordingly, this shall continue as the standard. In addition, all proposals for transmitter power output greater than 10 watts will be required to include an engineering analysis of potential interference to pertinent existing and pending receive sites in accordance with the established protection ratios adopted in this Order. Finally, each application must include documentation justifying why the additional power is necessary.

Protected Service Area

121. The provisions for the protected service area of MDS stations were established in the *Technical Standards Order.* The Order defined the protected service area of MDS stations employing either an omnidirectional or directional transmitting antenna. Accordingly, a station utilizing an omnidirectional transmitting antenna has a protected service area boundary which extends a 15-mile radius from its transmitter site. For a station utilizing a directional antenna, however, the service area boundary would approximate the shape of the radiated pattern, and would encompass a total area of 710 square miles or less. The protected contour of such station could be calculated utilizing the formula also provided for deriving distances along the boundary of the service area. MDS receive points located outside of the described boundaries are not protected from harmful interference.

122. *Further Notice (83-523)* proposed to utilize a similar service area concept for ITFS so that the boundaries described above would likewise define the ITFS minimum protected service area; *i.e.*, an area where receive sites should not experience interference. Therefore, additional receive sites within this area would be protected without the need for an application, after an initial authorization. Recognizing the need for protection to receive sites outside of this boundary, the Commission proposed to protect such sites from cochannel and adjacent channel interference provided that the power flux density of the transmitted signal is above -75.6 dBW/m^2.

123. Of the technical standards addressed in *Further Notice (83-523)*, the proposed service area concept generated the most opposition. Members of the ITFS community argue that ITFS and MDS are different services, and that the service area concept would be an inappropriate application of an MDS standard to ITFS. Many commentors contended that ITFS facilities frequently utilize receive sites at distances much greater than 15 miles and that all bona fide existing receive sites,

regardless of distance or power flux density level must be protected.[49] Others point out that many MDS operators, in order to optimize their service, must locate their transmitter site in close proximity to the greatest population density to reach a massive audience, whereas an applicant for ITFS must select its transmitter site based on the geographical distribution of receive sites to be served within its jurisdiction. Therefore, ITFS facilities are engineered to technical standards designed to meet the requirements of its service area. Thus, distant receive sites beyond 15 miles must often be served. By limiting the service area, they maintain, the Commission would be penalizing ITFS licensees for utilizing good engineering practices. Joint commentors represented by Crowell and Moring state that a 15-mile service boundary would be inconsistent with the Commission's stated goal of encouraging the expansion of ITFS, and if adopted would permanently inhibit growth of the service. Microband and Contemporary Communications Corporation contend that, while some ITFS facilities transmit to receive sites at distances greater than 15 miles, many ITFS stations' receive sites are clustered relatively close to the transmitter. In these situations, they contend, the service area rule would protect vast areas that were not actually served by ITFS, thus precluding possible spectrum reuse in nearby communities.

124. Careful consideration has been given to all of these arguments. In light of the overwhelming opposition to the service area proposal, the Commission has reconsidered its position on this issue. First, we are convinced that all existing receive sites that have been properly notified with the Commission must be protected from harmful interference regardless of the power flux density incident upon the receive site. The consistency of the opposition to the proposal has convinced us that to do otherwise would be an abdication of our responsibilities toward ITFS licensees. Since we decided to protect all receive sites, regardless of distance, the administrative advantages of a mathematically defined service area are largely nullified. We will, then, continue to protect all notified receive sites consistent with the newly adopted protection ratios specified in this Order. Moreover, we will continue to require applications to be filed to add receive sites in order to be entitled to interference protection. Lastly, we are aware of the possibility of individual licensees specifying additional distant receive sites in order to expand their protected area artificially. The Commission proposes to handle these situations on a case-by-case basis, requesting justification for any distant sites that appear to be specified primarily for the purpose of protection rights or precluding additional facilities in nearby communities.

[49] See, *e.g.*, Southern California ITFS Advisory Committee.

Adjacent Channel Interference

125. The Multipoint Distribution Service adopted 0 dB in the *Technical Standards Order* as the adjacent channel protection ratio (*i.e.*, the undesired channel signal must not be stronger than the desired signal at the receiver antenna terminals) for stations operating in the same area. Further, the MDS Order requires multichannel MDS operators to demonstrate that their signal will be at least 10 dB below the adjacent channel ITFS signal at the output of the ITFS receiving antenna. This 10 dB standard applies only to those ITFS stations that were constructed prior to May 26, 1983, since the older ITFS operations were not designed to operate in the presence of adjacent channel signals.

126. *Further Notice (83-523)* proposed to utilize the 0 dB protection ratio as the adjacent channel interference standard for ITFS. This standard was proposed for both colocated and noncolocated transmitter sites. Applicants applying for first adjacent channel facilities were also encouraged to colocate or be within 0.5 miles of other adjacent channel facilities to minimize the potential of harmful interference.

127. Commentors overwhelmingly support the establishment of an adjacent channel protection ratio for ITFS. Some commentors indicate that the Commission should also adopt the 10 dB standard for ITFS facilities constructed before May 26, 1983.[50] After having carefully considered this matter, we have decided to adopt the 10 dB protection standard for ITFS facilities constructed before May 26, 1983, and 0 dB for facilities subsequently constructed. This is consistent with the adjacent channel protection requirements adopted in the *Technical Standards Order* for MDS protection of ITFS facilities.[51] This two-fold standard provides protection for older ITFS facilities, thus insuring continued service from equipment which may not have been designed to operate in the presence of adjacent channel signals. Accordingly, these older facilities are afforded additional adjacent channel protection until their systems are either modified or upgraded with state-of-the art transmitting facilities. Provision is also made for the capabilities of newer equipment which is less susceptible to adjacent channel problems, thereby allowing more efficient spectrum utilization. It is stressed that this 10 dB standard applies only to ITFS stations that were constructed prior to May 26, 1983. All subsequently constructed stations will only be entitled to protection to the 0 dB standard.

128. As previously mentioned, *Further Notice (83-523)* encouraged applicants applying for first adjacent channel facilities to colocate or be within 0.5 miles of other adjacent channel facilities to alleviate adjacent

[50] See, *e.g.*, Joint Comments Represented by Jules Cohen or Southern California ITFS Advisory Committee.

[51] See *First Report and Order (80-113), supra*, at para. 35.

channel interference. Location of facilities to this extent minimizes, provided such stations operate with identical transmitting facilities and cross polarize the transmission antennas, the potential for adjacent channel interference. This is because the desired and undesired signals are approximately the same at all receive locations. Several parties commented on this issue. Although most agree that colocation was a useful interference reduction technique, there was some uncertainty as to its applicability to ITFS. ITFS operations, in general, serve school districts, hospitals and facilities which are rarely centrally located. Most commentors believe that only in rare situations would two separate educational entities find a common site mutually acceptable. MDS operations, in contrast, would normally desire to operate from a single central location to serve a metropolitan area as efficiently as possible. Therefore, although we are encouraging the use of colocation for ITFS, we realize that its benefits may be much more limited in ITFS than in MDS due to the fundamental differences between the two services.

129. Comments have been received regarding out-of-band emissions and its impact upon the adjacent channel protection ratios for ITFS. The primary concern is that the present out-of-band emission standards for transmitters specified in Section 74.936(b) of the rules are not sufficient to preclude adjacent channel interference between a new applicant and an existing station proposing to colocate or operate in the same geographical area. We are aware of the concerns raised concerning this issue, but do not believe that it is necessary to redefine the transmission standards at this time. The present regulations are clear and sufficient in regards to adjacent channel interference which may result due to out-of-band emissions between such proposals.

130. Historically, interference problems attributable to adjacent channel out-of-band emissions in ITFS were minor due to the general availability of channels. Prior to *Report and Order (80-112), supra,* twenty-eight channels were assigned to ITFS. The number of channels were sufficient for any particular community so that adjacent channel ITFS stations were seldom requested, or authorized, within the same community (with the exception of studio to transmitter linkage facilities). However, the increased demand for ITFS channels has resulted in proposals for first adjacent channel facilities in the same community as existing stations or in the same geographical area.

131. Section 74.936(b) of the Rules, 47 C.F.R. §74.936(b), specifies the required attenuation for transmitters operating at different power levels. These levels of attenuation are sufficient, provided adjacent channel stations are not authorized within the same geographical area. However, applicants proposing to operate within the same geographical area as existing stations on adjacent channels may find it necessary to install

filter circuits in the older stations' transmitting facilities to curtail interference due to out-of-band emissions. Moreover, such applicants may be required to conform their proposals to the requirements of Section 73.687(a)(3) of the Rules. 47 C.F.R. §73.687(a)(3). These parameters are identical to the transmission standards proposed for MDS facilities in the *Further Notice of Proposed Rulemaking and Notice of Inquiry* in General Docket 80-113, 98 FCC 2d 7 (1984). Accordingly, we believe these current standards are sufficient to govern adjacent channel protection and justify the ratios adopted in this Order.

132. All applicants applying to colocate or operate an adjacent channel station in an area where interference is anticipated are encouraged to initiate informal coordination with other applicants or licensees to resolve these matters before bringing such cases to the Commission.

Unattended Operation

133. *Further Notice (83-523)* proposed to relax the requirement that unattended ITFS relay stations use the direct heterodyne frequency conversion method. State-of-the art equipment that performs the desired frequency conversion by other technical means is presently available. Such equipment has the advantage of reducing the potential for adjacent channel interference.

134. Commentors who expressed an opinion on this matter were unanimously in favor of relaxing the present rules to allow for the use of state-of-the-art relay station equipment. Recent technological advancements (*e.g.*, the availability of equipment which demodulates the incoming signal to separate baseband video and audio signals for retransmission) render the direct heterodyne relay station requirement obsolete. Therefore, Section 74.934(a)(2) of the Rules, 47 C.F.R. §74.934(a)(2), will be amended accordingly.

Conclusion

135. The staff is directed to dismiss any application pending and not cut-off as of the date of the adoption of this Order that has been filed by an entity that is not "local", as that term is defined herein, to the community or area in which a license is sought. The dismissals will be without prejudice to the resubmission of new applications on October 1, 1987, or later, depending on channel availability in particular areas at that time.[52]

136. All other applicants that were cut-off from competing applicants during the period established in *Further Notice (83-523)*, see n. 25, *supra*,

[52] FCC Form 330-P, for a construction permit for new or modified ITFS facilities, will be amended to accommodate the clarifications and changes in interpretation adopted herein regarding eligibility, permissible use and technical standards, and to solicit information pertinent to the selection procedure for mutually exclusive applicants.

are requested to amend their applications within 30 days of publication of this Order in the Federal Register, by submitting information, where necessary, that demonstrates compliance with the rules and policies set forth herein.[53] The staff is directed to request additional information it considers appropriate to complete the processing of particular applications as they are reached for consideration. Since amendments to pending applications are anticipated to be in the nature of clarifying or additional information that will not affect the basic qualifications of applicants or the substance of their proposals, petitions to deny that are not on file as of 30 days from the publication of this Order in the Federal Register will generally not be considered.

137. Applicants whose request would result in the acquisition of more than four channels in a particular community and have not submitted a showing in support of a request for waiver of Section 74.902(d) of the Rules (47 C.F.R. §74.902(d)), see n. 36, *supra*, are required to do so within 30 days from the publication of this Order in the Federal Register. Applications from current holders of four or more ITFS channels that do not include a showing in support of a waiver will be summarily dismissed when reached for processing. Applicants that are not presently licensed for four or more ITFS facilities in the area and fail to submit a showing, or that submit a showing that does not justify a waiver, will be permitted to elect the single channel group they prefer.

138. Pursuant to the requirements of Section 603 of the Regulatory Flexibility Act, 5 U.S.C. §603, the Commission's final analysis is as follows:

I. Need for and objectives of the rule.

A significant increase in the demand for ITFS frequencies, generated primarily by the Commission's decision to permit ITFS licensees to lease excess channel capacity for commercial purposes, posed new questions about how the channels should be authorized and used. Many recent applications presented questions pertaining to eligibility requirements to be an ITFS licensee and the permissible scope of the service. In addition, the demand for channels resulted in numerous mutually exclusive applications. The rulemaking addressed issues necessary to update the 20-year old rules governing the ITFS service, looking toward a more efficient utilization of the ITFS spectrum, the growth and development of ITFS and the adaptation of the service to modern needs. Modifications of the rules are adopted pertaining to procedural requirements and protection

[53] Applications which were not cut-off will be processed in accordance with the new procedural rules set forth in this Order and can be amended, where necessary, during the "A" cut-off period.

standards to aid in the efficient and expedited processing of applications, as well as to maintain the primarily educational nature of the service.

II. Issues raised in response to the initial regulatory flexibility analysis.

No issues were raised specifically in response to the initial regulatory flexibility analysis. Generally, commentors argued, and the Commission agreed, that the current rules are inadequate to deal with the changes in the ITFS environment, and that any rules adopted should be suitable to the nature of the educational entities which are applicants and licensees. In response, the Commission has: clarified its eligibility criteria; established streamlined procedures for cutting off applications and choosing among mutually exclusive applications; clarified, expanded the scope, and reduced the amount of required formal educational programming; modified, based on comments and extrinsic evidence, the required hours of ITFS use necessary to qualify "excess capacity" available for non-ITFS use; and established technical standards for application processing and dispute settlement.

III. Significant alternatives considered and rejected.

The Commission considered the use of "window" filing periods and the use of alternate selection procedures (paper hearing and lottery), and rejected them as inappropriate for the ITFS service and unhelpful in reducing burdens on applicants and on the Commission. The Commission also declined to involve itself in setting acceptable provisions for lease agreements, opting for the simple establishment of a standard airtime "reservation" in lieu of any specified airtime recapture provision for the ITFS licensee, and for case-by-case resolution of any other licensee control issues which might arise.

139. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new or modified requirements or burdens on the public. Implementation of any new or modified requirement or burden will be subject to approval by the Office of Management and Budget as prescribed by the Act.

140. Accordingly, IT IS ORDERED, That Parts 74 and 94 of the Commission's Rules and Regulations ARE AMENDED, effective thirty days after publication in the Federal Register pursuant to 5 U.S.C. §553(d)(1), as set forth in Appendix B, under authority contained in 47 U.S.C. §§2, 4(i) and 303.

141. IT IS FURTHER ORDERED, That the captioned proceeding IS TERMINATED.

142. IT IS FURTHER ORDERED, That the Secretary of the Federal Communications Commission Shall Cause this *Second Report and Order* to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A-may be seen in FCC Dockets Branch, 1919 M Street, N.W., Washington, D.C.

APPENDIX B

Parts 74 and 94 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

I. Part 74 - Experimental, Auxiliary and Special Broadcast, and Other Program Distributional Services:

1. Section 74.15 is amended by revising paragraph (e) as follows:

§74.15 Station license period.

* * * * *

(e) Licenses for instructional television fixed stations will be issued for a period of 10 years beginning with the date of grant. An application for renewal of license (FCC Form 330-R) shall be filed not later than the first day of the fourth full calendar month prior to the expiration date of the license sought to be renewed. If the prescribed deadline falls on a nonbusiness day, the cutoff shall be the close of business of the first full business day thereafter.

2. Section 74.902 is amended by revising paragraph (d), and adding new paragraph (g), as follows:

§74.902 Frequency assignments.

* * * * *

(d) A licensee is limited to the assignment of no more than four channels for use in a single area of operation, all of which should be selected from the same Group listed in paragraph (a) of this section. An area of operation is defined as the area in which the use of channels by one

licensee precludes their use by other licensees. Applicants shall not apply for more channels than they intend to construct within a reasonable time, simply for the purpose of reserving additional channels. The number of channels authorized to an applicant will be based on the demonstration of need for the number of channels requested. The Commission will take into consideration such factors as the amount of use of any currently assigned channels and the amount of proposed use of each channel requested, the amount of, and justification for, any repetition in the schedules, and the overall demand and availability of ITFS channels in the community. For those applicant organizations formed for the purpose of serving accredited institutional or governmental organizations, evaluation of the need will only consider service to those specified receive sites which submitted supporting documentation pursuant to §74.932(a)(4).

* * * * *

(g) Where adjacent channel operation is proposed in any area, the preferred location of the proposed station's transmitting antenna is at the site of the adjacent channel transmitting antenna. If this is not practicable, the adjacent channel transmitting antennas should be located as close as reasonably possible.

3. Section 74.903 is amended by revising paragraphs (a) and (b) as follows:

§74.903 Interference.

(a) Since interference in this service will occur only when an unfavorable desired-to-undesired signal ratio exists at the antenna input terminals of the affected receiver, the directive properties of receiving antennas can be used to minimize the hazard of such interference. Interference may also be controlled through the use of directive transmitting antennas, geometric arrangement of transmitters and receivers, and the use of the minimum power required to provide the needed service. Harmful interference will be considered present when the reference receiving antenna is oriented to receive the maximum desired signal, and a free space calculation determines that the desired-to-undesired signal ratio is less than the value specified for the respective channel under consideration.

(1) Cochannel interference is defined as the ratio of the desired signal to the undesired signal, at the antenna input terminals of the affected receiver, when the ratio is less than 45 dB.

(2) Adjacent channel interference is defined as the ratio of the desired signal to undesired signal present in an adjacent channel, at the antenna input terminals of the affected receiver, when the ratio is less than 0 dB, except in cases where the stations were constructed before May 26, 1983. In such cases, the desired to undesired signal ratio shall not be less than 10 dB unless these stations have been upgraded with state-of-the art transmitting facilities.

(3) For purposes of this section, all interference calculations involving receive antenna performance shall use the reference antenna characteristics shown in Figure 1, of Section 74.937(a) or, in the alternative, utilize the actual pattern characteristics of the antenna in use at the receive site under study. If the actual receive antenna pattern is utilized, the applicant must submit complete details including manufacturer, model number(s), co-polar and cross-polar gain patterns, and other pertinent data.

(b) All applicants for instructional television fixed stations are expected to take full advantage of such directive antenna techniques to prevent interference to the reception of any existing operational fixed, international control station or instructional television fixed station

at authorized receiving locations. Therefore, all applications for new or major changes must include an analysis of potential interference to all existing and previously proposed stations in accordance with §74.903(a). An applicant for a new instructional television fixed station or for changes in an existing ITFS facility for a construction permit must include the following technical information with the application:

(1) An analysis of the potential for harmful cochannel interference with any authorized or previously proposed station if:

(i) The proposed transmitting antenna has an unobstructed electrical path to receive sites(s) of any other station(s) that utilize(s), or would utilize, the same frequency, or

(ii) the proposed transmitter is within 50 miles of the coordinates of any such station.

(2) An analysis of the potential for harmful adjacent channel interference with any authorized or previously proposed station(s) if the proposed transmitter is within 50 miles of the coordinates of any other station(s) that utilize(s), or would utilize, an adjacent channel frequency.

(3) An analysis concerning possible adverse impact upon Mexican and Canadian communications of the station's transmitting antenna is to be located within 35 miles of the border.

(4) In lieu of the interference analyses required by paragraphs (b)(1) and (b)(2) of this Section for any authorized or previously proposed station(s), an applicant may submit a statement(s) from the affected ITFS licensee(s) or permittee(s) that any resulting interference is acceptable.

(c) * * *

4. Section 74.910 is added as follows:

§74.910 Part 73 application requirements pertaining to ITFS stations.

The following rules are applicable to ITFS stations.

§73.3500	Application and report forms.
§73.3511	Applications required.
§73.3512	Where to file; number of copies.
§73.3513	Signing of applications.
§73.3514	Content of applications.
§73.3517	Contingent applications.
§73.3519	Repetitious applications.
§73.3533	Application for construction permit or modification of construction permit.
§73.3534	Application for extension of construction permit or for construction permit to replace expired construction permit.
§73.3536	Application for license to cover construction permit.
§73.3542	Application for temporary or emergency authorization.
§73.3561	Staff consideration of applications requiring Commission action.

§73.3562	Staff consideration of applications not requiring action by the Commission.
§73.3564(a), (b)	Acceptance of applications.
§73.3566	Defective applications.
§73.3568	Dismissal of applications.
§73.3587	Procedure for filing objections.
§73.3598	Period of construction.
§73.3599	Forfeiture of construction permit.

The applicability of other rules in Part 73, where appropriate, is not precluded by this section.

5. Section 74.911 is added as follows:

§74.911 Processing of ITFS station applications.

(a) Applications for ITFS stations are divided into two groups:

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. These applications are subject to the provisions of §74.911(c). A major change for an ITFS station will be any proposal to add new channels, change from one channel (or channel group) to another, or increase power. However, the Commission may, within 15 days after the acceptance of an application, or 15 days after the acceptance of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change, and subject to the provisions of §74.911(c).

(2) The second group consists of applications for licenses and all other changes in the facilities of authorized stations.

(b) A new file number will be assigned to an application for a new station or for major changes in the facilities of an authorized station, when it is amended so as to effect a major change, as defined in paragraph (a)(1) of this Section, or result in a situation where the original party or parties to the application do not retain control of the applicant as originally filed. An application for change in the facilities of any existing station will continue to carry the same file number even though (pursuant to Commission approval) an assignment of license or transfer of control of such licensee or permittee has taken place if, upon consummation, the application is amended to reflect the new ownership.

(c) Applications for ITFS stations will be processed as nearly as possible in the order in which they are filed. In order that those applications which are mutually exclusive may be grouped and fixed for processing, the Commission will periodically release a public notice listing applications for new facilities or major modifications which have been accepted for filing and announcing a date 60 days after its release on which the listed applications will be considered available and ready for processing and by which all mutually exclusive applications, petitions to deny the listed applications, and major amendments to the listed applications must be filed. A second Public Notice will be released, listing applications filed in response to the initial Public Notice, providing 30 days after its release to file petitions to deny against the listed applications or to make minor amendments.

(d) Those applications, other than mutually exclusive applications, which upon examination meet other pertinent requirements and would serve the public interest, convenience and

necessity will be granted. Mutually exclusive applications will be processed pursuant to the provisions in Section 74.913.

6. Section 74.912 is added as follows:

§74.912 Petitions to deny.

(a) Any party in interest may file with the Commission a petition to deny any application for new facilities or major changes in the facilities of authorized stations, provided such petitions are filed by the date established pursuant to the cut-off provisions of §74.911(c). In the case of all other applications, except those excluded under Section 309(c) of the Communications Act of 1934, as amended, petitions to deny must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the applications. In the case of applications for renewal of license, petitions to deny may be filed after the issuance of a public notice of acceptance for filing of the applications and up until the first day of the last full calendar month of the expiring license term.

(b) The applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition in which allegations of fact or denials thereof shall be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such oppositions and replies shall be those provided in §1.45.

(c) Only petitions to deny filed against a tentative selectee (§74.913) will be considered. If the petition does not present substantial and material questions of fact warranting a hearing, the petition will be denied and the tentative selectee will be granted a license where, upon examination, the Mass Media Bureau finds that other pertinent requirements have been met and the public interest, convenience and necessity would be served. Where necessary, the points of the application will be modified to comport with any findings made as a result of the review. In the event that the tentative selectee's application is denied or its point total reduced, the point system process will be repeated, where necessary, to determine the tentative selectee or applicants qualifying for the random tie-breaker. If, upon examination, a substantial and material question of fact is found and the Bureau is unable to find that the public interest, convenience and necessity will be served by granting the application of the tentative selectee pursuant to the point system, its application will be designated for hearing pursuant to Section 309 of the Communications Act of 1934, as amended. Petitions for reconsideration, motions to stay, or applications for review may be submitted at the time the Bureau grants or denies the application of the tentative selectee pursuant to the filing periods specified in §1.45.

7. Section 74.913 is added as follows:

§74.913 Selection procedure for mutually exclusive ITFS applications.

(a) If timely filed ITFS applications are determined to be mutually exclusive, such applications will be processed and assessed points to determine the tentative selectee for the particular channels. The tentative selectee will be the applicant with the highest point total under the procedure set forth in this section, unless the provisions of subsection (c) apply, and will be awarded the requested channels if the Commission concludes that such an award will serve the public interest, convenience and necessity.

(b) Each application will be awarded a predetermined number of points under the criteria listed:

(1) Four points for applicants that are "local," as defined in §74.932, n. 1.

(2) Three points for accredited schools, educational institutions, or their governing bodies applying within their jurisdiction;

(3) Two points for applicants whose request, if granted, would result in the acquisition of four or fewer ITFS channels by that applicant;

(4) One point for a proposed weekly schedule of twenty-one or more average hours per channel per week of formal educational programming (§74.931(a)), or of forty-one or more average hours per channel per week of other ITFS programming; two points for forty-one or more average hours per channel per week of formal educational programming, or for twenty-one or more average hours per channel per week of formal educational programming plus forty-one or more average hours per channel per week of other ITFS programming.

(5) One point for an existing E or F channel licensee seeking to relocate and showing an established need for an expanded service that cannot be accommodated on its grandfathered E or F facilities. The applicant must submit a specific request and adequate supporting documentation.

(c) If the best qualified (highest scoring) two or more applicants have the same point accumulation, the tentative selectee will be determined through a tie-breaker mechanism.

(d) The tie-breaker will use a mechanical random-selection process, under the direction of the Secretary's office, in which each qualifying applicant has an equal chance.

NOTE 1: Average hours per channel per week are determined by totaling the number of scheduled hours per week of programming between 8:00 a.m. and 10:00 p.m. Monday through Saturday in the subject category, and dividing that total by the number of channels.

NOTE 2: A one point award for serving a different category of students would apply, for example, to an applicant in a community with three ITFS operators serving high school students which proposes to serve primary school(s) or college(s) while another mutually exclusive new applicant proposes to serve another high school.

8. Section 74.931 is amended by revising paragraphs (a), (b) and (e) as follows:

§74.931 Purpose and permissible service.

(a) Instructional television fixed stations are intended primarily to provide a formal educational and cultural development, in aural and visual form, to students enrolled in accredited public and private schools, colleges and universities. Every channel authorized must be used to transmit formal educational programming offered for credit to enrolled students of accredited schools.

(1) All applicants that do not list accredited schools as receive sites must name the school(s) and the degree(s) or diploma(s) for which the formal programming will be offered and describe the administration of the course(s). They must submit documentation, written or signed by the authorities responsible for the schools' curricula, verifying each of these points.

(b) Such stations may also be used for the additional purpose of transmitting other visual and aural educational, instructional and cultural material to selected receiving locations, including in-service training and instruction in special skills and safety programs, extension of professional training, informing persons and groups engaged in professional and technical activities of current developments in their particular fields, and other similar endeavors.

* * * * *

(e) A licensee may use excess capacity on each channel to transmit material other than the ITFS subject matter specified in paragraphs (a), (b), (c) and (d) of this section, provided it preserves at least 40 hours per week, including at least 6 hours per weekday (Monday through Friday), excluding holidays and vacation days, for ITFS purposes on that channel; and at least 20 hours per week of the preserved time on each channel must be used for ITFS programming, including at least 3 hours per weekday, excluding holidays and vacation days. This preservation may consist of airtime strictly reserved for ITFS use and not used for non-ITFS programming, or, of time used for non-ITFS programming but subject to ready recapture by the licensee for ITFS use with no economic or operational detriment to the licensee. Only ITFS programming and preserved airtime scheduled between 8:00 a.m. and 10:00 p.m., Monday through Saturday, will qualify to meet this requirement. All of the capacity available on any subsidiary channel of any authorized channel may be used for the transmission of material to be used by others. When an ITFS licensee makes capacity available on a common carrier basis, it will be subject to common carrier regulation. A licensee operating as a common carrier is required to apply for the appropriate authorization and to comply with all policies and rules applicable to that service. Responsibility for making the initial determination of whether a particular activity is a common carriage rests with the ITFS licensee. Initial determinations by the licensees are subject to Commission examination and may be reviewed at the Commission's discretion. Leasing activity may not cause unacceptable interference to cochannel and adjacent channel operations.

* * * * *

NOTE 1: Any medical science courses offered by hospitals to their staffs as training for state licenses will qualify as an essential use of an ITFS channel.

9. Section 74.932 is amended by revising paragraph (a) and subparagraphs (1) and (2) as follows:

§74.932 Eligibility and licensing requirements.

(a) A license for an instructional television fixed station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provisions of the Communications Act of 1934, as amended.

(1) Only local applicants can file applications and be considered for licenses during the local priority period, which extends for one year from the effective date of these rules.

(A) During this local priority period, the existing of any outstanding application for ITFS channels by a nonlocal applicant will not prevent the filing and/or grant of an application by a local entity for those same channels.

(2) A publicly supported educational institution must be accredited by the appropriate state department of education.

(3) A privately controlled educational institution must be accredited by the appropriate state department of education or the recognized regional and national accrediting organizations.

(4) Those applicant organizations whose eligibility is established by service to accredited institutional or governmental organizations must submit documentation from proposed receive sites demonstrating they will receive and use the applicant's formal education

programming. The applicant's educational background and experience and history of educational service may also be considered in determining its eligibility.

(5) Nonlocal applicants, in addition to submitting letters from proposed receive sites, must demonstrate the establishment of a local program committee in each community where they apply.

* * * * *

NOTE 1: A "local" licensee (or applicant) is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. For a college or university, this would include any area where it has a campus. An educational organization will generally be regarded as "local" if the address of the organization's headquarters is located within the area where the facility is sought. An entity created by a state or local government for the purpose of serving formal educational needs will be considered "local" throughout the area within the government's jurisdiction over which its authority is intended to extend. An educational entity located within a state and created by affiliated educational institutions within that state, including hospitals, will be considered "local" in those areas where the member institutions are located.

NOTE 2: Documentation from proposed receive sites which are to establish the eligibility of an entity not serving its own enrolled students for credit should be in letter form, written and signed by an administrator or authority who is responsible for the receive site's curriculum planning. The administrator must indicate that the applicant's program offerings have been viewed and that such programming will be incorporated in the site's curriculum. The letter should discuss the types of programming and hours per week of formal and informal programming expected to be used and the site's involvement in the planning, scheduling and production of programming. If other levels of authority must be obtained before a firm commitment to utilize the service can be made, the nature and extent of such additional authorization(s) must be provided.

NOTE 3: Letters submitted on behalf of a nonlocal entity must confirm that a member of the receive site's staff will serve on the local program committee and demonstrate a recognition of the composition and power of the committee. The letter should show that the staff member will aid in the selection, scheduling and production of the programming received over the system.

10. Section 74.934 is amended by revising subparagraphs (a)(1) and (a)(2); by removing subparagraphs (a)(3) and (a)(4); and redesignating (a)(5) as (a)(3) as follows:

§74.934 Unattended operation.

(a) * * *

(1) The transmitter shall be equipped with automatic circuits which will permit it to radiate only when a signal on the channel which it is intended to retransmit is present at the input terminals of the apparatus. The automatic circuit may be provided with a reasonable time-delay factor to prevent the transmitter from being turned off during momentary failures of the incoming signal. The station, where the transmitter is installed, must be designed, constructed, and protected so that the transmitter can only be activated or controlled by operators authorized by the licensee.

(2) The transmitter shall accomplish retransmission of the incoming signal by either linear amplification, heterodyne frequency conversion or by modulating the transmitter with the demodulated incoming signal. In cases where frequency conversion to a different channel is employed, the electrical characteristics of the incoming signal when retransmitted shall not be significantly altered except as to frequency and amplitude. In cases where linear amplification is employed, the electrical characteristics shall not be significantly altered except as to amplitude when retransmitted. Care shall be taken in the design and installation of an unattended relay station to prevent instability which could result in spurious or other unwanted radiation.

(3) Where the antenna supporting structure of an unattended station is required to have aeronautical hazard markings pursuant to the provisions of Part 17 of this chapter, the licensee shall provide for inspection and logging of observations of such markings as required by §§17.47 and 17.49 of this chapter.

(b) * * *

11. Section 74.937 is amended by revising paragraph (a) as follows:

§74.937 Antennas.

(a) In order to minimize the hazard of harmful interference from other stations, directive receiving antennas should be used at all receiving locations. The choice of receiving antennas is left to the discretion of the licensee. However, for the purpose of interference calculations, the general characteristics of the reference receiving antenna shown in Figure 1 of this section (*i.e.*, a 2-foot parabolic reflector antenna) are assumed to be used in accordance with the provisions of Section 74.903(a)(3) unless pertinent data is submitted of the actual antenna in use at the receive site. Licensees may install receiving antennas with general characteristics superior to those of the reference receive antenna. Nevertheless, should interference occur and it can be demonstrated by an applicant that the existing antenna at the receive site is inappropriate, a more suitable yet practical receiving antenna should be installed. In such cases, the modification of the receive site will be in the discretion, and will be the responsibility, of the licensee serving the site.

12. Section 74.951 is amended by adding a new subparagraph (h) as follows:

§74.951 Modification of transmission systems.

* * * * *

(h) Any addition of receiving locations or to modify such a location to a receive and response station.

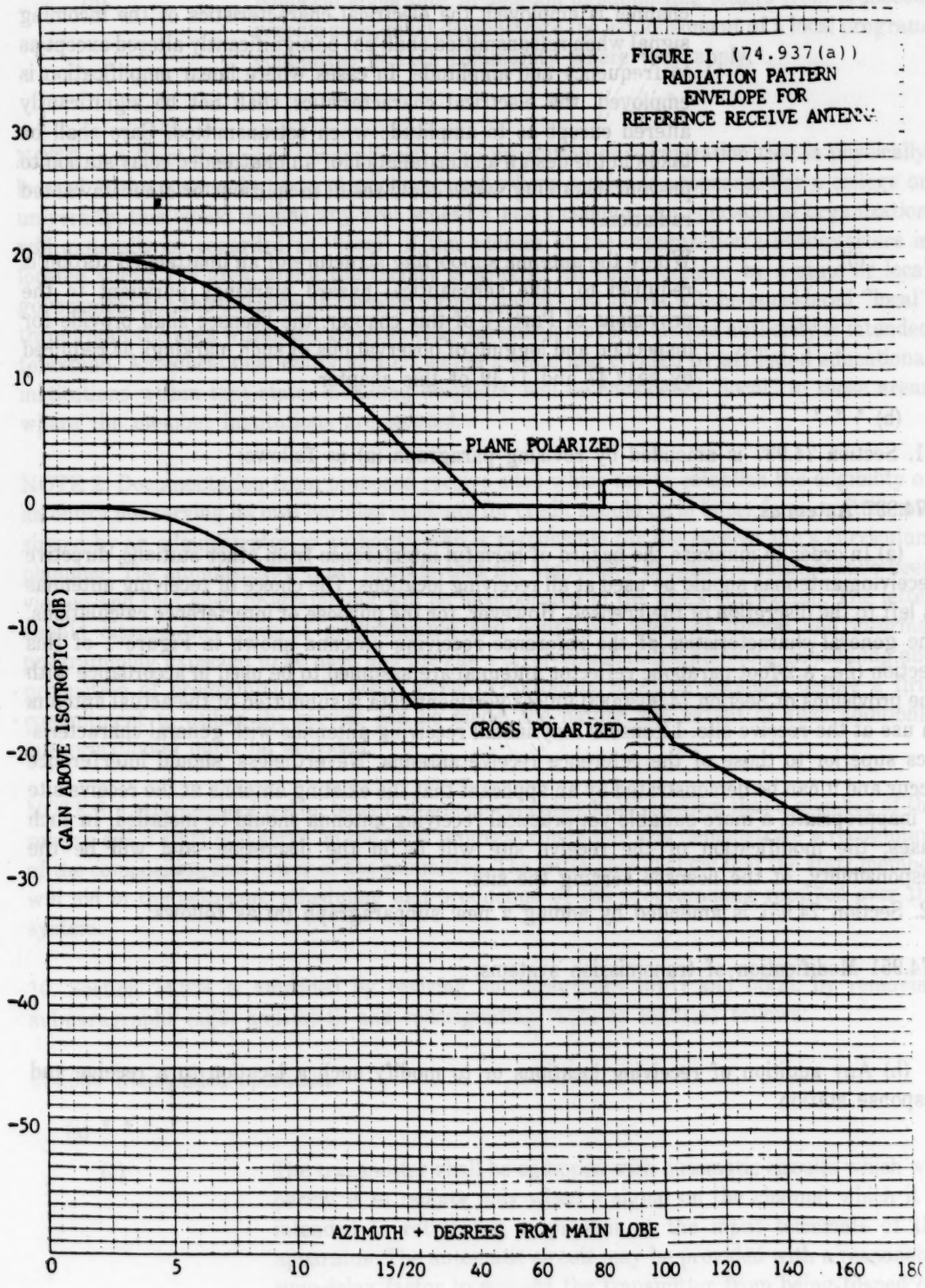
FIGURE I (74.937(a))
RADIATION PATTERN
ENVELOPE FOR
REFERENCE RECEIVE ANTENN
30
20
10
0
-10
-20
-30
-40
-50
GAIN ABOVE ISOTROPIC (dB)
PLANE POLARIZED
CROSS POLARIZED
AZIMUTH + DEGREES FROM MAIN LOBE
0
5
10
15/20
40
60
80
100
120
140
160
180

II. Part 94 — Private Operational-Fixed Microwave Radio Service:

1. Section 94.65 is amended by revising paragraph (f) as follows:

§94.65 Frequencies.

* * * * *

(f) 2500-2690 MHz: Operational-fixed stations may be authorized to operate in this band on the specific channels indicated below:

FREQUENCIES (MHz)

2650-2656[1]

2662-2668[1]

2674-2680[1]

2686.9375[1,2]

2687.9375[1,2]

2688.9375[1,2]

Such assignments are subject to the condition that all stations licensed on these channels must comply with the technical standards set forth in §94.95. Operational-fixed stations authorized in this band as of July 16, 1971, which do not comply with the above provisions may continue to operate on the frequencies assigned on a coequal basis with other stations operating in accordance with the Table of Frequency allocations. Requests for subsequent license renewals or modifications for such stations will be considered. However, expansion of systems comprised of such stations will not be permitted, except on frequencies allocated under this part.

[1] Pursuant to §94.69, stations licensed on these channels may employ any type of emission consistent with efficient use of the spectrum and good engineering practice, except that type B, damped-wave emission will not be authorized.

[2] Response frequencies: when authorized, they may be paired respectively with the channels 2650-2656, 2662-2668, and 2674-2680 MHz.

* * * * *

2. Section 94.67 is amended by revising paragraph (a) footnote 2 as follows:

§94.67 Frequency tolerance.

* * * * *

[2] In accordance with the technical standards contained in §94.95 when A5 emission is to be employed. Otherwise, the frequency tolerance shall be 0.0025%.

* * * * *

3. Section 94.71 is amended by revising paragraph (b) footnote 3 as follows:

§94.71 Emission and bandwidth limitations.

* * * * *

[3] Assignments for applications proposing to employ amplitude modulation (A5) for the transmission of a video signal will be made in accordance with §94.95. For applications not proposing to employ a video signal, the standards contained in paragraph (c) below shall apply.

* * * * *

4. Section 94.75 is amended by revising paragraph (b) footnote 2 as follows:

§94.75 Antenna limitations.

* * * * *

[2] Except for 2,150-2,160 MHz, where the maximum beamwidth is 360 degrees and except for frequencies in the 2,500-2,690 MHz band where standards contained in §94.95 apply.

* * * * *

5. Section 94.92 is amended by revising footnotes 6 and 9 as follows:

§94.92 Technical standards for stations authorized prior to July 1, 1976.

* * * * *

[6] This frequency band is available only for operational-fixed stations employing television transmissions. The transmitting equipment for such stations shall meet the technical standards prescribed in §94.95. Use of these frequencies in the industrial radio service is secondary to stations in the public safety radio service. Operational-fixed stations authorized in the band 2500-2690 MHz prior to July 16, 1971, may continue to be authorized on a coequal basis to other stations operating in accordance with the Table of Frequency allocations. No expansion of existing systems on frequencies not allocated to this service will be permitted. Additional stations or new assignments may be authorized only in accordance with the provisions of this section.

* * * * *

[9] Response frequencies. When authorized they are to be paired respectively with the bands 2650-2656, 2662-2668, and 2674-2680 MHz, and used in accordance with the technical standards prescribed in §94.95.

6. A new Section 94.95 is added as follows:

§94.95 Special provisions for operational-fixed stations in the 2500-2690 MHz band.

Notwithstanding any contrary provisions in this part, the channels 2650-2656 MHz, 2662-2668 MHz, and 2674-2680 MHz, and the corresponding response channels 2686.9375 MHz, 2687.9375 MHz, and 2688.9375 MHz may be authorized for operational-fixed service use subject to the following technical standards:

(a) Emissions and bandwidth. The average power of radio frequency harmonics of the visual and aural carriers, measured at the output terminals of the transmitter, shall be attenuated no less than 60 dB below the peak visual output power within the assigned channel. All other emissions appearing on frequencies more than 3 MHz above or below the

upper and lower edges, respectively, of the assigned channel shall be attenuated no less than: (1) 30 dB for transmitters rated at less than 10 watts visual peak power output. (2) 40 dB for transmitters rated at 10 watts or more visual peak power output. Should interference occur as the result of emissions outside the assigned channel, greater attenuation may be required.

(b) Antennas. (1) In order to minimize the hazard of harmful interference from other stations, directive receiving antennas should be used at all receiving points. The choice of receiving antennas is left to the discretion of the licensee. However, should interference occur and it can be demonstrated that such interference could be eliminated through the use of a more suitable yet practical directive receiving antenna, the licensee of the station causing the interference is absolved of the responsibility of correcting the interference condition. (2) Directive transmitting antennas shall be used whenever feasible so as to minimize interference to other licensees. The radiation pattern shall be designed to minimize radiation in directions where no reception is intended. When a station is used for point-to-point service, an appropriate directional antenna must be used. (3) In selecting a location for the transmitting antenna, it should be borne in mind that interference to the reception of its transmission is most likely to come from the direction in which receiving antennas must be aimed to receive its transmissions. Whenever possible the location should be chosen so that the receiving antennas in its system are aimed in directions from which interfering signals are least likely to come. (4) The use of elevated receiving antennas is preferable to the use of elevated transmitting antennas or greater power to provide the desired service. (5) The use of vertical or horizontal plane polarization or right-hand or left-hand rotating (circular) polarization may be used to minimize the hazard of harmful interference between systems. The Commission reserves the right to specify the polarization to be used. (6) The power gain compared to an isotropic antenna and the directive properties of the transmitting and receiving antennas proposed to be employed, as well as the geometric distribution of the transmitting and receiving point, shall be supplied with each application for a new fixed station or for changes in the antenna facilities of an existing station.

(c) Transmission standards. Stations in this band are not required to attenuate the lower sideband by any specified amount unless interference to the reception of another station results from emissions in excess of those permitted television broadcast stations, in which case the attenuation specified in §73.687(a)(3) of this chapter shall apply. However, in no case shall the amplitude of any lower sideband component exceed the amplitude of the upper sideband component having the highest amplitude.

(d) Acceptability of equipment for licensing. (1) Transmitters employed in this service must have type acceptance by the Commission. Type acceptance may be given under either of the following conditions: (i) A transmitter or translator may be type accepted upon the request of any manufacturer of such equipment built in quantity by following the type acceptance procedure set forth in Part 2 of this chapter, provided that the date and information submitted indicate that the equipment meets all technical requirements applicable to this service. If accepted, such transmitting equipment will be included on the Commission's "Radio Equipment List, Equipment Acceptable for Licensing." Applicants specifying equipment included on such a list need not submit detailed descriptions and diagrams where the correct type number is specified, provided that the equipment proposed is identical with that accepted. Copies of the Radio Equipment List are available for inspection at the Commission's office in Washington, D.C., and at each of its field offices. (ii) An application specifying a transmitter or translator not included on the Radio Equipment List, may be accepted upon the request of a prospective licensee submitting a complete description of the equipment, including the circuit diagram, listing of all tubes used, function of each, multiplication in each stage, plate current and voltage applied to each tube, and a description of the oscillator circuit together with any devices installed for the purpose of frequency stabilization. However, if this data has been filed with the Commission by a manufacturer in connection with a request for type

acceptance, it need not be submitted with the application but may be referred to as "on file." Measurement data for type acceptance made in accordance with paragraph (d)(1)(i) of this section shall be submitted with the license application. (2) Additional rules with respect to withdrawal of type acceptance, modification of type accepted equipment, and limitations on the findings upon which type acceptance is based are set forth in Part 2 of this chapter.

(e) Frequency tolerance. (1) The frequency of the visual carrier shall be maintained within 60 Kilocycles of the assigned frequency at all times when the station is in operation. (2) The frequency of the aural carrier shall be maintained in accordance with the provisions of §73.687(c)(1) of this chapter.

Aeronautical Radio Navigation Service
Aeronautical Service
CATV Use of Aeronautical Radio Frequencies

The FCC generally denied seven petitions for reconsideration of its decision implementing new rules to prevent cable television systems from interfering with aeronautical frequencies. Cable systems may operate on frequencies allocated for aeronautical radio if they meet frequency offset, monitoring and cumulative signal leakage requirements.
—*Amendment of Part 76*
Docket No. 21006

Aeronautical Radio Navigation Service
Aeronautical Service
CATV Cumulative Signal Leakage
CATV Use of Aeronautical Radio Frequencies

In view of the interim effectiveness of uniform frequency offsets and of quarterly leakage monitoring requirements, the FCC decided to delay the implementation of the cumulative signal leakage requirements for a period of five years. Quarterly monitoring requirements do not require close-proximity inspection of every linear mile of cable in the system on a quarterly basis. Rather, cable service personnel can make spot checks throughout the entire system while on service calls or while performing installations.
—*Amendment of Part 76*
Docket No. 21006

Aeronautical Radio Navigation Service
Aeronautical Service
CATV Carriage, Grandfathered Frequencies
CATV Use of Aeronautical Radio Frequencies
Grandfathering, See CATV Carriage

The FCC's grant of grandfathering rights to cable systems to operate on aeronautical bands for a five-year period had been on a frequency-by-frequency basis. Cable operators are also allowed to increase the system radius while continuing to operate under the grandfathering rules.
—*Amendment of Part 76*
Docket No. 21006

FCC 85-333

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 76 of the Commission's Rules to Add Frequency Channelling Requirements and Restrictions and to Require Monitoring for Signal Leakage from Cable Television Systems	Docket No. 21006

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 21, 1985; Released: July 1, 1985

BY THE COMMISSION:

Introduction

1. The Commission has before it seven petitions for reconsideration of the *Second Report and Order* ("*Second Report*") in this proceeding, 49 Fed. Reg. 45431, published November 16, 1984.[1] Comments in response to the petitions were filed by six parties with replies submitted by two parties.[2]

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[1] The petitioners are as follows: Aeronautical Radio, Inc., jointly with Air Transport Association of America ("ARINC"); Cable Investments, Inc., Capital Cities Cable, Inc., Cole, Raywid & Braverman; the National Cable Television Association ("NCTA"); Pepper & Corrazini; and Star CATV Investment Company jointly with Galaxy Cablevision Investors and Galaxy Cablevision Partners. In addition to the petitions for reconsideration, a request for clarification was filed by Blooston and Mordkofsky and a request for immediate relief was filed by Dow, Lohnes and Albertson. These pleadings raised questions regarding the effective date of the new rules, interim procedures to be followed by cable systems wishing to utilize new aeronautical frequencies and grandfathering provisions. These issues have been resolved by the Commission's *Public Notice* of January 30, 1985 (See para. 3, *infra*), and this Memorandum Opinion and Order.

[2] Comments were filed by: American Radio Relay League, Archer S. Taylor, Capital Cities Cable, Inc., Heritage Communications, Inc., Jones Intercable, Inc., and NCTA. In a motion filed January 30, 1985, ARINC and NCTA requested an extension of time for the filing of oppositions. As no Commission action has been taken on this motion, we will consider it a request for acceptance of late-filed pleadings. Since the public interest is served by consideration of the late-filed comments (those of NCTA and Jones Intercable), and no opposition to this request was indicated, the comments are accepted. Reply comments submitted by ARINC and NCTA, were also filed late. These pleadings are also

Background

2. The primary goal in this proceeding has been to determine the best way to protect aeronautical navigation and communications radio services from potentially harmful interference emanating from cable television systems. It is the Commission's desire to promote this goal without unduly constraining the development and utilization of new cable technologies. Consistent with these considerations, the record supported limiting cable operation on the frequencies used by aeronautical radio services given the potential for interference from cable systems that radiate or "leak" cable signals. The record further supported requiring those cable systems operating in the aeronautical bands to be well maintained and well monitored in order to prevent, detect and repair leaks. In this regard, the Commission adopted rules in the *Second Report* which allowed cable systems to operate in the aeronautical radio bands if they met uniform aeronautical channel frequency offset requirements, annual basic signal leakage performance criteria, and routine monitoring requirements.

3. After publication of the *Second Report*, the Commission released a *Public Notice* on January 30, 1985, (No. 2275) which clarified the grandfather rights conferred by the decision, and which established interim procedures for use until the new rules were fully effectuated. As the new rules could not become effective until their review by the Office of Management and Budget, it was decided that, in the interim, each request to use new aeronautical frequencies would be considered on an individual basis.[3] During this period (January 30, 1985, to March 11, 1985) the Commission conditionally permitted the use of new aeronautical frequencies upon a showing that their use was consistent with the criteria set forth in the *Second Report.* On March 11, 1985, the rules concerning frequency offsets became effective; however, the rules concerning routine system monitoring did not take effect because of an OMB request for public clarification. In addition to resolving the petitions for reconsideration, this action provides the requested OMB clarifications.

Issue Analysis

4. The issues, as raised in the petitions for reconsideration, are as follows:

1. Uniform Frequency Offset Requirement

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accepted as there has been no opposition to their consideration and their acceptance will foster a full and complete record. Finally, a letter offered on behalf of Crawfordsville Community Cable Corporation will be considered an informal comment.

[3] The Office Management and Budget (OMB), upon further Commission clarification of the monitoring requirements, approved the new rules with the exception of the cable television annual Basic Signal Leakage Performance Criteria. (OMB Nos. 3060-0331 and 3060-0332) Approval of such criteria by OMB awaits resolution of the petitions for reconsideration.

2. Basic Signal Leakage Criteria
3. Routine Monitoring Requirements
4. Grandfathering
5. Cable Signal Threshold Power Level
6. Notification Requirements
7. Leakage Limit

Each issue will be developed separately.

Issue 1: Uniform Frequency Offset Requirement

5. In the *Second Report*, the Commission held that in the aeronautical *communications* bands (118-136 MHz, 225-328.6 MHz, and 335.4-400 MHz), cable carriers must be offset from aeronautical channel center frequencies by 12.5 kHz ±5 kHz.[4] The aeronautical *communications* channel center frequencies are spaced at 25 kHz increments, beginning at the lower band edges. Similarly in the aeronautical *navigation* bands (108-118 MHz and 328.6-335.4 MHz) cable carriers must be offset from aeronautical channels center frequencies by 25 kHz ±5 kHz.[5] The aeronautical radionavigation channels center frequencies are spaced at 50 kHz increments, beginning at the lower band edges.[6] These offsets were adopted to prevent interference to the aeronautical services should a cable system improperly leak signals.

6. In their joint petition for reconsideration Aeronautical Radio, Inc., and Air Transport Association of America, challenge these requirements, in so far as they allow cable carriers to be offset only 12.5 kHz, with a frequency tolerance of ±5 kHz, in the aeronautical communication bands. ARINC believes that the new provisions should require cable carriers to be maintained with an offset of at least 25 kHz from local aeronautical stations, and with a frequency tolerance of ±5 kHz. ARINC claims that the 12.5 kHz offset will not provide adequate protection to aeronautical communications. They also argue that the aeronautical industry might require additional frequencies and thereby split their current channels.

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[4] The *Second Report* inadvertently omitted reference to the expansion of the aeronautical band 118-136 MHz to 118-137 MHz. This extension is a result of frequency allocation of the 1979 WARC, and becomes effective January 1, 1990. Thus, the new cable restrictions will apply to the extended part of the aeronautical band on January 1, 1990. This amendment will be reflected in our rules.

[5] The *Second Report* also inadvertently omitted special offset requirements (100 kHz from the frequency 121.5 mHz and 50 kHz from the two frequencies 156.8 mHz and 243.0 mHz) for CATV operation near certain aeronautical and marine emergency radio frequencies. These requirements were formerly in the Rules and designated as Section 76.611. We did not intend to make changes to those requirements, and therefore, will reinsert them under a new reference section number.

[6] The radionavigation glide path channels, in the 328.6 MHz to 335.4 MHz band, are listed in FCC Rule Section 87.501.

7. The National Cable Television Association, in its reply comments, submits that offsets of 25 kHz, as suggested by ARINC, would not work without a return to area-distance frequency coordination procedures because cable carrier frequencies would be on the same carrier frequencies as the aeronautical channels. NCTA further notes that the military and the Federal Aviation Administration ("FAA") support the 12.5 kHz offsets and have not indicated any plans to split their aeronautical channels in the near term. A petition from the firm of Cole, Raywid and Braverman, on behalf of several cable TV operators, requests that the old frequency offset rules be reinstituted. It argues that the old procedure was routine and feasible; whereas, the new requirements will cause wholesale disruptions and create the need for reeducation of the industry. Also, Capital Cities, Inc., argues that in reviewing existing station assignments in the aeronautical band, it found limited use of the channels by aeronautical licensees. Thus, they maintain that mandatory offsets are not justified.

8. Because many cable television systems radiate or leak signals, there is a potential for interference to aircraft navigation or communications when identical frequencies are used. Slight frequency offsets of the cable signals can prevent such interference. Unfortunately, while frequency offsets should eliminate current problems, such offsets can be viewed only as an interim solution. As observed by ARINC, the aeronautical channels may be split at some time in the future, which would place the offset cable carriers directly on the newly split aeronautical channels. Current aeronautical channels are a result of a relatively recent frequency split and it is anticipated that another channel division will not occur until after January 1, 1995, the date set by the International Civil Aeronautics Organization (ICAO).[7] Therefore, we expect that uniform frequency offsets of 12.5 kHz from aeronautical communication channels and 25 kHz from navigation channels (both with ±5 kHz tolerance), can be used for ten years to provide interference protection to aeronautical communications and navigation radio services. This offset procedure provides a high degree of interference protection and can remain in place until either: 1) the FAA splits the 25 kHz channels, or 2) the cable industry can fully bring leakage problems under control. In the interim, it provides flexibility for cable operations throughout the aeronautical bands.

9. In response to ARINC's specific assertion that the 12.5 kHz ±5 kHz offset is insufficient, we note that ARINC's main objection appears based on the fact that one cable television "midband" channel from 126 MHz to

[7] The last time the FAA split channels, both the cable industry and the FCC were given several years lead time to adjust to the new channel plan. We anticipate that this also would be the case for future channel splits.

132 MHz is potentially in conflict with its operations.[8] However, under the frequency usage plan now generally adopted by the industry, the nearest potential cable interfering frequency is the audio carrier for the cited cable television channel. We agree with NCTA that because the cable audio carrier power level is normally operated about fifteen decibels below the power level of the video carrier, interference to ARINC channels can be expected to be minimal or non-existent. We further agree with NCTA that a 25 kHz ±5 kHz offset would place CATV carriers back onto the exact frequencies of the current aeronautical channels, thereby necessitating the reinstitution of frequency coordination procedures. This procedure is not only time-consuming, but also is not as effective as uniform offsets given rapid changes in FAA frequency assignments that can bring cable channels into conflict with aviation frequencies.

10. In response to Capital Cities' observations, we note that the FAA has begun planning and contracting for an extensive up-grade of communication and navigation facilities throughout the United States. Therefore, channels that may have been relatively silent are likely to become more active in the near future. Increased use of these channels by the FAA can reasonably be expected to result in more conflicts with cable television systems, and thus limit cable operators' uses of the mid-band frequencies. Further, we do not agree with petitioners that the old rules are working. Because of continual changes in FAA assignments and "drop-ins" of new aeronautical frequencies, a significant number of cable operators, as shown in a recent random sampling, may not now be in compliance with the coordinated offset criteria for one or more frequencies. Absent a waiver, cable operators must vacate such conflicting channels within 30 days when so notified.[9] Additionally, the Commission recently completed a computer program that is capable of finding such conflicts and generating eviction notices. Once this program becomes fully operational, the number of documented conflicts can be expected to increase, causing numerous directed frequency changes in the cable industry. The uniform offset criteria eliminates the uncertainty associated with the old procedures.

11. Finally, in the frequency offset requirements, the *Second Report* provided for cable operators utilizing the HRC (Harmonically Related Carrier) system to set the fundamental frequency, from which the visual carriers are derived, by integer multiples of precisely 6.0003 MHz with a tolerance of ±1 Hz. Those cable operators utilizing IRC (Incrementally Related Carriers) systems were expected to meet the separation requirements by merely offsetting the nominal frequency of the video carrier

[8] ARINC is permitted to operate its own set of offset frequency carrier networks in the band 128.825-132.0 MHz.

[9] See Section 76.619(e) (formerly 76.610(e)) of the Commission's Rules.

component generator by an additional 12.5 kHz. As noted by Archer S. Taylor of the firm of Malarkey-Taylor Associates, Inc., the visual carrier frequencies for IRC systems may be phased-locked to a comb generator with reference set at (6n + 1.250 ± 0.0125) MHz. With these generator reference frequencies, neither HRC nor IRC meet the offset requirements of 25 kHz ± 5 kHz in the navigation band 108-118 MHz. Thus, they may only operate in this band at power levels below 10^{-4} watts threshold.[10] However, the HRC system, as described will be 33.5 kHz offset from the nearest affected channel in the navigation glide path band 328.6-335.4 MHz, thereby meeting the 25 kHz offset requirement. The IRC system may also meet this offset requirement by setting its generator reference to certain odd multiple equal to or greater than 3 times the 0.0125 MHz (12.5 kHz) communication band offset requirement, e.g. (6n + 1.250 ± 0.0375) MHz.

Issue 2: Basic Signal Leakage Criteria

12. In the *Second Report*, the Commission concluded that cable systems must annually show compliance with basic signal leakage performance standards. Thus, as a prerequisite for operation in the aeronautical radio bands, cable systems must use ground-based or airspace measurements to indicate compliance with a Cumulative Leakage Index (CLI). The details and methodology of this requirement were based on the joint government-industry findings in the *Final Report of the Advisory Committee on Cable Signal Leakage.*

13. NCTA, in its petition, argues that such an annual CLI measurement requirement is superfluous in conjunction with mandated frequency offsets. It submits that only the offset requirements are needed to ensure against interference well into the future. NCTA, as well as Crawfordsville Community Cable, states that the CLI requirement is too rigid, immensely burdensome, and valueless. Capital Cities adds that the Advisory Committee did not consider the impact of frequency offsets in formulating the CLI procedures. Furthermore, Capital Cities maintains that the CLI is fundamentally flawed and requests the Commission to allow alternative annual test methods.

14. While NCTA argues that the CLI is superfluous if imposed along with the frequency offset criteria, we emphasize that *minimal signal leakage is the primary long-term objective* of this proceeding. The basic signal leakage criteria is key to demonstrating that fundamental objective. In other words, the CLI is a necessary periodic test to demonstrate safe levels of signal leakage. On the other hand, the offset criteria is only a secondary, as well as a temporary, safeguard to assure protection to

[10] Independently, Commission staff will work with the FAA staff looking toward further HRC and IRC use of the navigation bands.

aeronautical frequencies. At some future time we hope to remove the offset frequency use restrictions to allow cable systems maximum flexibility. But, such restrictions cannot be removed before the record indicates that leakage has been brought under control.

15. In the absence of any significant evidence to the contrary, we continue to believe that the CLI is a valid measurement technique. It was developed as a consequence of an extensive scientific study by the Advisory Committee on Cable Signal Leakage. Further, we note that the cable industry, including NCTA, was well represented on the Advisory Committee and raised no objections to the procedure at the time. The work of the committee represents the best efforts of the industry and government experts. We must therefore reject Capital Cities' assertion that the technique is fundamentally flawed. However, as noted in the *Second Report*, we are receptive to submissions for consideration of alternative test methodologies. Capital Cities has submitted preliminary documentation of its on-going study for such an alternative signal leakage test method. When such new techniques have been refined, they may receive Commission acceptance. Until that time, the CLI will be considered the only authoritative work in the area. However, in order to allow cable operators as much flexibility as possible in performing the CLI, we will allow the use of any frequency that can be correlated to the frequencies within the VHF aeronautical band.

16. In view of the quarterly monitoring (see issue 3) and uniform offset requirements, we are persuaded, however, to provide cable operators with a longer transition period within which to comply with the CLI obligation. Therefore, we are delaying the CLI requirement for a period of five years. This will give the cable industry adequate time to develop the necessary resources and expertise to comply with the CLI requirements and to depreciate fully existing cable plants. We also believe that this delay will encourage cable operators to commence operations under the new uniform offset procedures as rapidly as possible, thus further assuring the prevention of harmful interference to aeronautical services. We do, however, expect cable operators to begin working immediately to assure compliance with the CLI within the five year time period.

Issue 3: Monitoring Requirements

17. The *Second Report* required that cable TV operators using aeronautical frequencies under the *new rules* provide a method for regular monitoring for signal leakage. This monitoring is required to cover all portions of the cable system at least once every three months. Monitoring equipment and procedures had to be adequate to detect a leakage source of 20 uV/m or greater at a distance of 3 meters. During regular monitoring, any leakage source of 20 uV/m or greater in the

aeronautical radio frequency bands was to be noted, and any such leakage source was to be eliminated within a reasonable period of time.[11]

18. Several parties petitioned the Commission to reconsider the quarterly monitoring requirement, stating their preference for only an annual monitoring obligation. For instance, NCTA asserts that the new rule implies a requirement for a rigid, four times per year inspection of the cable plant by personnel and equipment, dedicated exclusively to that purpose. A number of cable companies, such as Cable Investments, Inc., submit that the quarterly monitoring requirement will be especially burdensome to multiple system operators. Furthermore, they assert that there is no evidence in the record to suggest that annual monitoring is inadequate. They also argue that in view of the offset and frequency stability requirement, an annual monitoring rule would adequately assure that aeronautical radio systems do not receive harmful interference. Some of the other petitioners, like Capital Cities, merely request us to state that the requirements can be satisfied by a program of continuous monitoring which reasonably can be expected to cover all portions of a system every three months.

19. In response to the above concerns, the *Second Report* outlined what the Commission envisioned as the quarterly monitoring requirement. Specifically, at paragraph 63, the Commission stated, "such monitoring can be done by service personnel while conducting service calls, installations, etc. The only extra effort on the part of cable operators comes when leaks are found and must be repaired." Clearly, it was not the Commission's desire to impose a burdensome quarterly requirement on cable operators. The quarterly requirement was merely to assure continued vigilance for new leaks. Such signal leakage repair programs should be part of the cable system's preventive maintenance plans that are, or should be, already in place. The petitioners read our previous rule to require that specific measurements be made at every point in the cable plant every three months. That clearly was not intended. The rules are therefore being modified to more accurately reflect what was envisioned for the quarterly monitoring, *i.e.*, a regular maintenance function to be performed by existing personnel in the discharge of their normal duties.

Issue 4: Grandfathering

20. The Commission limited grandfathering privileges for cable usage of aeronautical radio frequencies under the old method (case-by-case authorization) to those requests received or authorized prior to the

[11] For clarification, we note the distinction of the basic cable signal leakage (CLI) performance test from monitoring requirements. The CLI is intended to determine the overall interference potential of a cable system to aeronautical radio services. On the other hand, routine monitoring is a maintenance function of regularly checking for excessive leaks and making repairs.

adoption of the *Second Report.* Further, should usage of any of the authorized frequencies by the aeronautical radio service arise in the vicinity of the cable system, absent a waiver of the grandfathering rules, the system would forfeit its grandfathering privileges to those frequencies. Also, the system would not be permitted to substitute a different frequency not previously approved by the Commission. In any event, all grandfathering privileges would disappear in five years.

21. A number of petitioners, as well as commenters, have raised questions regarding the effective date and the scope of the grandfathering rights conferred by the *Second Report.* Such parties as Pepper & Corrazini and Cable Investments, Inc., ask whether the effective grandfathering date is the document's adoption date (October 26, 1984), the date appearing in its ordering clause (December 17, 1984), the date appearing in Section 76.618 of the new rules (January 1, 1985), or the date of approval by the Office of Management and Budget (March 11, 1985). In this context, Jones Intercable, Inc. ("Jones"), requests that we reconsider the grandfathering date (November 30, 1984) announced in the *Public Notice.* Jones alleges that it is difficult, if not impossible, to attain compliance for all signal processors operating in the aeronautical bands using current circuit designs. Therefore, Jones asserts, manufacturers cannot and will not ship equipment to meet the new rules at this time. Jones submits that the November 30, 1984, grandfathering date thus will work a hardship on the industry and the public, in that an operator, absent a *de minimis* extension of a system's radius, will be unable to add frequencies or activate additional cable plant if not authorized by November 30, 1984. In response to this point, NCTA urges the Commission to grant waivers of the rules where necessary.

22. A few petitioners request that the Commission provide cable system operators with additional "lead time," of from three to six months. This would give cable operators time to plan for the expansion of existing systems or the construction of new systems. They argue that the unanticipated costs in providing new channels will delay the provision of new services to the public. During this time period, petitioners suggest that cable operators be given a window to file for clearance of frequencies under the former rules. Cable Investments, Inc., further requests that systems which timely file for clearance should be permitted to commence use of the authorized frequencies any time prior to January 1, 1990. However, to allay any concerns over frequency "warehousing" by cable operators, Cable Investments suggests that a second cut-off date could be established by which cleared frequencies would have to be placed into operation or any grandfathered right to those frequencies would be forfeited.

23. The petitioners also request clarification as to what is actually grandfathered. Cole, Raywid & Braverman asks whether existing systems, or only existing uses of existing systems, are grandfathered. Others, such as Capital Cities Cable, Inc., request clarification on whether cable operators are permitted to operate under a *hybrid system* during the transition period. In other words, should operators be permitted to offset frequencies under the new rules while continuing to use frequencies that are grandfathered under existing regulations? If not, it is submitted, in order to add additional channels an operator would be required to offset frequencies on the entire system which, in effect, would render the five year transition period meaningless. Pepper and Corrazzini request clarification as to whether once clearance has been requested for a frequency, the Commission will consider an application for waiver to use that frequency at any time during the transition period.

24. The comments of Archer S. Taylor question whether later extensions to grandfathered systems are considered part of the system. He submits that extensions which do not increase the system radius to the most remote point of the system, existing or planned, which already have been declared in notifications (under old Section 76.610(b)), should not invalidate grandfathering rights. Mr. Taylor further notes that where the system radius would be increased by an extension, a new notification under the old rules would provide adequate information to determine the existence of any conflict.

25. Many of the questions raised by petitioners and commenters in regard to grandfathering privileges have been answered by the *Public Notice*. As indicated in that release, it was the Commission's intention to stop processing individual requests to add new aeronautical frequencies under the old rules on October 26, 1984, the adoption date of the *Second Report*. However, OMB's approval notwithstanding, in view of the fact that the *Second Report* was not released by the Commission until November 9, 1984, nor published in the Federal Register until November 16, 1984, and for purposes of administrative efficiency, it was decided that the Commission would process all requests to add aeronautical frequencies under the old rules received as of November 30, 1984.

26. We do not believe it is advisable to modify the November 30, 1984 grandfathering date. It is the Commission's responsibility to ensure the safe operation of radio services vital to the protection of life. We have provided cable operators considerable time (5 years) within which to adjust to the changes under the new rules. Changing the effective grandfathering date for any significant time, as requested by some petitioners, will only delay the effective control of signal leakage. In those instances where cable operators might have difficulty in obtaining

equipment capable of meeting the new rules after having made a diligent good-faith effort to do so, we will consider waiver requests.

27. In the *Second Report*, the Commission intended to extend grandfathering rights to cable operators only on a frequency basis. That intention was clarified by the Commission's *Public Notice.* The *Second Report* required system operators adding new aeronautical frequencies to existing plants or extending their authorized service radii to follow the new aeronautical offset criteria. In essence, what the *Second Report* permitted was a *hybrid system* for five years, or a complete transition to the new procedures.

28. In response to a request by Pepper & Corrazzini, we are clarifying the point that if usage of any of the authorized frequencies by an aeronautical radio service arises in the vicinity of the cable system, and consequently the system forfeits its grandfathering privileges to that frequency, application for waiver under the former rules for continued use of the existing frequency will be considered. Applications for waiver will not be considered, however, for new frequencies to replace existing ones that have come into conflict with aeronautical channels.

29. Further, we have reconsidered whether to allow an operator to increase the system radius and continue to operate under the grandfathering rules. We now believe that an extension of service area would be beneficial to the public so that a segment of the community or an adjacent community not yet served by the cable system would not be deprived of service for a period perhaps as long as five years. The operator, however, must notify the Commission of such extensions, obtain clearance for the extension and comply with the grandfathering requirements.

Issue 5: Cable Signal Threshold Power Level

30. In the *Second Report*, the Commission changed the cable system peak power levels, at which the aeronautical restrictions apply, from 10^{-5} watts to 10^{-4} watts in a 25 kHz bandwidth (except for operation on the emergency frequencies). NCTA requests that we modify our rules to reflect that *average* power rather than *peak* power is to be used as the threshold. NCTA alleges that an average power level over a specified time period, rather than peak power as now required, is the better measure of potential cable interference. This is due primarily to the long integration time in airborne indicating devices, making power over time more critical than instantaneous power.[12] We agree with NCTA in this regard. Therefore, we are adopting NCTA's recommendation to modify references in the rules from 10^{-4} watts "peak in a 25 kHz bandwidth" to 10^{-4}

[12] This finding was related to the FAA by FCC staff by letter on November 29, 1984, for over-the-air services and it has not been disputed by the FAA.

watts "with an average power level across a 25 kHz bandwidth in any 160 microsecond period."

Issue 6: Notification Requirements

31. In the *Second Report*, the Commission raised the cable system permitted power levels in the aeronautical radio bands because low power carriers (10^{-5} watts or less) have a very low probability of causing interference even under "worst case" conditions of signal leakage. The threshold power level of 10^{-5} watts, however, was retained for FCC notification purposes. This has caused considerable confusion in the industry and consequently has led us to reconsider this notification requirement. Since it can be expected that cable systems, when routinely monitored, will not cause interference to aeronautical services when using carrier signals with power levels below 10^{-4} watts, no purpose is served by requiring cable television operators using carrier signals of power levels less than 10^{-4} watts to meet Commission notification requirements. Therefore, 10^{-4} watts is adopted as the universal trigger level for FCC notification for new frequencies under Sec. 76.615 of the Rules.[13]

32. In response to a request by Cable Investments, Inc., we will clarify which notification provisions apply to grandfathered systems. The petitioner specifically asks whether grandfathered systems need to provide additional notification to the Commission before commencing use of precleared frequencies or whether the new notification requirements are intended only for use of non-grandfathered frequencies. Although systems are not required to give the Commission notification under the new rules as to grandfathered frequencies, they must continue to comply with the previous requirements for carrier signals equal to or greater than 10^{-5} watts for their *grandfathered frequencies* inasmuch as quarterly monitoring and uniform offsets do not apply to these frequencies. The rules in the appendix are modified to reflect the above changes and clarifications (See Appendix A).

Issue 7: Leakage Limit

33. Several of the cable interests suggested relaxing the signal leakage limits now contained in Section 76.605(a)(12) of the Rules. Petitioners cite the Advisory Committee's recommendation of 100 uV/m at 3 meters from the cable and the more relaxed limits in other rule parts as the basis for the relaxation. The Commission agrees with the need to examine the current limit and has issued a separate docket that reviews leakage and several other technical issues (MM Docket No. 85-38, 50 Fed. Reg. 7801), (February 26, 1985). Therefore, we will not reconsider the

[13] Measurement of the power levels for notification purposes on the coaxial distribution system, as opposed to measurement of internal levels in amplifiers, headend equipment, etc.

matter in this proceeding, but will issue a decision in the above referenced proceeding.

Ordering Clauses

34. Accordingly, IT IS ORDERED, That the Petitions for Reconsideration ARE GRANTED as specified above and ARE DENIED in all other respects.

35. IT IS FURTHER ORDERED, That the request for clarification filed by Blooston and Mordkofsky and the motion for extension of time filed by ARINC and NCTA ARE GRANTED.[14]

36. Authority for this action is contained in Sections 4, 301, 302, 303, 304, 307, 308, 309 and 405 of the Communications Act of 1934, as amended, and the Cable Communications Policy Act of 1984.

37. IT IS FURTHER ORDERED, That the rule amendments, pertaining to the monitoring of cable equipment and the CLI, as set forth in Appendix A, become effective 30 days after publication in the Federal Register, except that the CLI requirement will not become effective before Office of Management and Budget approval.

38. The Secretary shall cause a copy of this *Memorandum Opinion and Order* with the attached Regulatory Flexibility Analysis (Appendix B) to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act, 5 U.S.C. §601 *et seq.* (Supp. 1984).

39. IT IS FURTHER ORDERED, That the Secretary shall cause a copy of this Memorandum Opinion and Order to be published in the FCC Reports.

40. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

41. For further information concerning this proceeding, contact Freda Lippert Thyden, Mass Media Bureau, (202) 632-7792, on legal concerns or Bernard Gorden, Mass Media Bureau, (202) 632-9660, on technical concerns.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[14] The request for immediate relief filed by Dow, Lohnes & Albertson, in effect, was granted by the *Public Notice* of January 30, 1985.

Appendix A

47 CFR Part 76 is amended as follows:

1. The authority citation for Part 76 continues to read as follows:

Authority: Sections 4 and 303, 48 Stat. 1066 and 1082 (47 U.S.C. 154 and 303).

2. 47 CFR 76.610 is revised in its entirety to read as follows:

§76.610 Operation in the frequency bands 108-137 and 225-400 MHz——Scope of application.

The provisions of Sections 76.611, 76.612, 76.613, 76.614 and 76.615 are applicable to all cable television systems transmitting carriers or other signal components carried at an average power level equal to or greater than 10^{-4} watts across a 25 kHz bandwidth in any 160 microsecond period, at any point in the cable distribution system in the frequency bands 108-137 and 225-400 MHz for any purpose. For grandfathered systems, refer to Sections 76.618 and 76.619.

NOTE 1: See the provisions of Section 76.616 for cable operation near certain aeronautical and marine emergency radio frequencies.

NOTE 2: Until January 1, 1990, the band 136-137 MHz is allocated as an alternative allocation to the space operation, meteorological-satellite service and the space research service on a primary basis. After January 1, 1990, the space service will become secondary to aeronautical mobile service radio. Until January 1, 1990, the band 136 to 137 MHz is excluded from the rule sections regarding protection of aeronautical frequencies.

3. 47 CFR 76.611 is amended by revising paragraphs (a), (b) and (f) and adding a NOTE to read as follows:

§76.611 Cable television basic signal leakage performance criteria.

(a) No cable television system shall commence or provide service in the frequency bands 108-137 and 225-400 MHz unless such system is in compliance with one of the following cable television basic signal leakage performance criteria:

* * * * *

(b) In paragraph (a)(1) and (a)(2) of this section the unmodulated test signal used on the cable plant shall: (1) be within the VHF aeronautical band 108-137 MHz or any other frequency in which the results can be correlated to the VHF aeronautical band and (2) have an average power level equal to the average power level of the strongest cable television carrier on the system.

* * * * *

(f) Notwithstanding paragraph (a) of this section, a cable operator shall be permitted to operate on any frequency which is offset pursuant to Section 76.612 in the frequency band 108-137 MHz for the purpose of demonstrating compliance with the cable television basic signal leakage performance criteria.

Note: The provisions of Section 76.611 will become effective on July 1, 1990.

4. 47 CFR 76.612 is revised in its entirety to read as follows:

§76.612 Cable television frequency separation standards.

All cable television systems which operate in the frequency bands 108-137 and 225-400 MHz shall comply with the following frequency separation standards:

(a) in the aeronautical radiocommunication bands 118-137, 225-328.6 and 335.4-400 MHz, the frequency of all carrier signals or signal components carried at an average power level equal to or greater than 10^{-4} watts in a 25 kHz bandwidth in any 160 microsecond period must operate at frequencies offset from certain frequencies which may be used by aeronautical radio services operated by Commission licensees or by the United States Government or its Agencies. The aeronautical frequencies from which offsets must be maintained are those frequencies which are: (1) within one of the aeronautical bands defined in this subparagraph, and (2) when expressed in MHz and divided by 0.025 yield an integer. The offset must meet one of the following two criteria:

(1) all such cable carriers or signal components shall be offset by 12.5 kHz with a frequency tolerance of ±5 kHz; or

(2) the fundamental frequency from which the visual carrier frequencies are derived by multiplication by an integer number which shall be 6.0003 MHz with a tolerance of ±1 Hz (Harmonically Related Carrier (HRC) comb generators only).

(b) in the aeronautical radionavigation bands 108-118 and 328.6-335.4 MHz, the frequency of all carrier signals or signal components carrier at an average power level equal to or greater than 10^{-4} watts in a 25 kHz bandwidth in any 160 microsecond period shall be offset by 25 kHz with a tolerance of ±5 kHz. The aeronautical radionavigation frequencies from which offsets must be maintained are defined as follows:

(1) within the aeronautical band 108-118 MHz when expressed in MHz and divided by 0.025 yield an even integer.

(2) within the band 328.6-335.4 MHz, the radionavigation glide path channels are listed in Section 87.501 of the Rules.

NOTE: The HRC system, as described above, will meet this requirement in the 328.6-335.4 MHz navigation glide path band. Those Incrementally Related Carriers (IRC) systems, with comb generator reference frequencies set at certain odd multiples equal to or greater than 3 times the 0.0125 MHz aeronautical communications band offset, e.g. (6n + 1.250 ± 0.0375) MHz, may also meet the 25 kHz offset requirement in the navigation glide path band.

5. 47 CFR 76.614 is revised in its entirety to red as follows:

§76.614 Cable Television System Regular Monitoring.

Cable television operators transmitting carriers in the frequency bands 108-137 and 225-400 MHz shall provide for a program of regular monitoring for signal leakage by substantially covering the plant every three months. The incorporation of this monitoring program into the daily activities of existing service personnel in the discharge of their normal duties will generally cover all portions of the system and will therefore meet this requirement. Monitoring equipment and procedures utilized by a cable operator shall be adequate to detect a leakage source which produces a field strength in these bands of 20 uV/m or greater at a distance of 3 meters. During regular monitoring, any leakage source which produces a field strength of 20 uV/m or greater at a distance of 3 meters in the aeronautical radio frequency bands shall be noted and such leakage sources shall be repaired within a reasonable period of time. The operator shall maintain a log showing the date and location of each leakage source identified, the date on which the leakage was repaired, and the probable cause of the leakage. The log shall be kept on file for a period of two (2) years and shall be made available to authorized representatives of the Commission upon request.

6. 47 CFR 76.615 is revised in its entirety to read as follows:

§76.615 Notification requirements.

All cable television operators shall comply with each of the following notification requirements:

(a) The operator of the cable system shall notify the Commission annually of all signals carried in the aeronautical radio frequency bands, noting the type of information carried by the signal (television picture, aural, pilot carrier, or system control, etc.) The timely filing of FCC Form 325, Schedule 2, will meet this requirement.

(b) The operator of a cable system shall notify the Commission before transmitting any carrier or other signal component with an average power level across a 25 kHz bandwidth in any 160 microsecond time period equal to or greater than 10^{-4} watts at any point in the cable distribution system on any new frequency or frequencies in the aeronautical radio frequency bands. Such notification shall include:

1) legal name and local address of the cable television operator;

2) the names and FCC identifiers (e.g. CA0001) of the system communities affected;

3) the names and telephone numbers of local system officials who are responsible for compliance with Sections 76.610 through 76.616 of the Rules;

4) carrier and subcarrier frequencies and tolerance, types of modulation and the maximum average power levels of all carriers and subcarriers occuring at any location in the cable distribution system.

5) the geographical coordinates of a point near the center of the cable system, together with the distance (in kilometers) from the designated point to the most remote point of the cable plant, existing or planned, which defines a circle enclosing the entire cable plant;

6) a description of the routine monitoring procedure to be used; and

7) for cable operators subject to Section 76.611, the cumulative signal leakage index derived under Section 76.611(a)(1) or the results of airspace measurements derived under Section 76.611(a)(2), including a description of the method by which compliance with basic signal leakage criteria is achieved and the method of calibrating the measurement equipment. The information described in (b)(7) shall be provided to the Commission prior to July 1, 1990 and each calendar year thereafter.

7. New 47 CFR 76.616 Operation near certain aeronautical and marine emergency radio frequencies, is added to Subpart K, Part 76, to read as follows:

§76.616 Operation near certain aeronautical and marine emergency radio frequencies.

The transmission of carriers or other signal components capable of delivering peak power levels equal to or greater than 10^{-5} watts at any point in a cable television system is prohibited within 100 kHz of the frequency 121.5 MHz, and is prohibited within 50 kHz of the two frequencies 156.8 MHz and 243.0 MHz.

8. 47 CFR 76.618 is revised in its entirety to read as follows:

§76.618 Grandfathering.

Cable television systems are permitted to use aeronautical frequencies which were requested or granted for use by November 30, 1984, under Section 76.619 of the Rules until July 1, 1990.

9. New 47 CFR 76.619 Grandfathered Operation in the frequency bands 108-136 and 225-400 MHz, is added to Subpart K, Part 76, to read as follows:

§76.619 Grandfathered Operation in the frequency bands 108-136 and 225-400 MHz

All cable television systems operating in a grandfathered status under Section 76.618 of the Rules and transmitting carriers or other signal components capable of delivering peak power equal to or greater than 10^{-5} watts at any point in the cable system in the frequency bands 108-136 and 225-400 MHz for any purpose are subject to the following requirements:

(a) The operator of the cable system shall notify the Commission annually of all signals carried in these bands, noting the type of information carried by the signal (television, aural, or pilot carrier and system control, etc.). The timely filing of FCC Form 325, Schedule 2, will meet this requirement.

(b) The operator of the cable system shall notify the Commission of the proposed extension of the system radius in these bands. Notification shall include carrier and subcarrier frequencies, types of modulation, the previously notified geographical coordinates, the new system radius and the maximum peak power occurring at any location in the cable distribution system. No system shall extend its radius in these bands without prior Commission authorization.

(c) The operator of the cable system shall maintain at its local office a current listing of all signals carried in these bands, noting carrier and subcarrier frequencies, types of modulation, and maximum peak power which occurs at any location within the cable distribution system.

(d) The operator of the system shall provide for regular monitoring of the cable system for signal leakage covering all portions of the cable system at least once each calendar year. Monitoring equipment and procedures shall be adequate to detect leakage source which produce field strengths in these bands of 20 microvolts per meter at a distance of 3 meters. The operator shall maintain a log showing the date and location of each leakage source identified, the date on which the leakage was eliminated, and the probable cause of the leakage. The log shall be kept on file for a period of two (2) years, and shall be made available to authorized representatives of the Commission on request.

(e) All carrier signals or signal components capable of delivering peak power equal to or greater than 10^{-5} watts must be operated at frequencies offset from aeronautical radio services operated by Commission licensees or by the United States Government or its agencies within 111 km (60 nautical miles) of any portion of the cable system as given in paragraph (f) of this section. (The limit of 111 km may be increased by the Commission in cases of "extended service volumes" as defined by the Federal Aviation Administration or other federal government agency for low altitude radio navigation or communication services).

If an operator of a cable system is notified by the Commission that a change in operation of an aeronautical radio service will place the cable system in conflict with any of the offset criteria, the cable system operator is responsible for eliminating such conflict within 30 days of notification.

(f) A minimum frequency offset between the nominal carrier frequency of an aeronautical radio service qualifying under paragraph (d) of this Section and the nominal frequency of any cable system carrier or signal component capable of delivering peak power equal to or greater than 10^{-5} watts shall be maintained or exceeded at all times. The minimum frequency offsets are as follows:

Frequencies	*Minimum frequency offsets*
108-118 MHz	(50 + T) kHz.
328.6-335.4 MHz	
118-136 MHz	
225-328.6 MHz	(100 + T) kHz.
335.4-400 MHz	

In this table, T is the absolute value of the frequency tolerance of the cable television signal. The actual frequency tolerance will depend on the equipment and operating procedures of the cable system, but in no case shall the frequency tolerance T exceed ±25 kHz in the bands 108-136 and 225-400 MHz.

APPENDIX B
Regulatory Flexibility Analysis

I. *Need for and Purpose of Rule*

1. The Commission has reaffirmed that to assure the protection of aeronautical communications from harmful interference, cable systems should not be permitted to operate on the same frequencies used by aeronautical radio services. It reaffirmed, however, that it is in the public interest for cable systems to operate in the aeronautical radio bands if they comply with frequency offset, monitoring and cumulative signal leakage requirements.

II. *Summary of Issues Raised by Public Comment in Response to the Final Regulatory Flexibility Analysis, Commission Assessment, and Changes Made as a Result.*

A. *Issues Raised*:

2. A private aviation group suggested that the frequency offsets adopted were insufficient to protect aeronautical radio services. On the other hand, certain cable interests suggested that uniform offsets are adequate in and of themselves to assure the protection of aeronautical communications. Thus, these petitioners request the elimination of the signal leakage performance criteria and a return to an annual, rather than a quarterly, monitoring requirement. Some petitioners also request clarifications on grandfather rights and notification obligations.

B. *Assessment*:

3. Although the uniform offsets were challenged, we believe as does the FAA, that they provide adequate protection to aeronautical services. Because uniform frequency offsets are only a temporary solution, however, they cannot be relied upon to protect aeronautical channels from harmful interference in the long term. But, in view of the interim effectiveness of uniform offsets and quarterly leakage monitoring requirements, the Commission delayed the implementation of the cumulative signal leakage requirement for a period of five years. This will provide the cable industry with adequate time to develop the necessary resources and expertise to comply with this requirement and to fully depreciate existing equipment. In regard to the monitoring requirement, cable maintenance must be on-going, not just a quick, once-per-year status report. The quarterly requirement will assure the regular attention to problems, and thus prevent harmful interference.

C. *Changes Made as a Result of this Proceeding*:

4. For the next five years cable television systems may operate in the aeronautical radio bands if they meet uniform channel frequency offset and monitoring requirements. After that time, cable systems must comply with the basic signal leakage performance criteria as well as the uniform offset and monitoring requirements.

5. The Commission clarified the monitoring requirement noting its intention to assure that the cable operator checks the system regularly for excessive leaks and makes proper repairs. These requirements do not require close-proximity inspection of every linear mile of cable in the system on a quarterly basis. Rather, cable service personnel can simply make spot checks throughout the entire system, either while on service calls or while performing installations.

6. On reconsideration, the Commission decided to allow a cable operator to extend the system radius under the old aeronautical rules so that a segment of the community, or an adjacent community not yet served by the cable system, would not be deprived of service for a period of perhaps as long as five years.

7. Since average power, over time, provides a better indicator of interference potential, cable operators may now use average rather than peak power as the cable signal threshold.

8. The cable system power levels, at which notification requirements apply, were relaxed because low level signals on a cable system have a very minimal potential to interfere with aeronautical radio services.

III. *Significant Alternatives Considered and Rejected.*

9. We considered allowing cable usage of non-emergency aeronautical radio frequencies without frequency offsets, cumulative signal leakage index requirements (CLI) or quarterly monitoring obligations. These rules are necessary, however, to ensure that cable systems do not cause harmful interference to aeronautical radio services. The uniform offsets, although temporary, are necessary under current conditions, whereas, the CLI as well as the monitoring obligations are long-term tools for minimizing CATV signal leakage in the aeronautical bands.

Common Carrier, Depreciation Rates, Prescription of Depreciation Rate

This Order prescribes revised depreciation rates for AT&T Communications-Interstate Division for accounts and sub-accounts shown in the Appendix to the Order and, permits amortization of reserve deficiencies for accounts having estimated remaining lives in excess of four years.
—*AT&T Communications*

FCC 85-342

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

The Prescription of Revised Depreciation Rates for AT&T Communications-Interstate Division

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1985; Released: July 9, 1985

BY THE COMMISSION:

I. Introduction

1. The American Telephone and Telegraph Company (AT&T) filed a petition on May 11, 1984, requesting that the Commission prescribe revised depreciation percentages for all depreciable accounts of AT&T Communications-Interstate Division (ISD) and for each of its twenty-two interexchange subsidiaries (IXCs)[1] effective January 1, 1985. AT&T proposes depreciation rates based upon revisions in the life and salvage

[1] The twenty-two interexchange carriers are as follows: AT&T Communications of California, Inc., AT&T Communications of Delaware, Inc., AT&T Communications of Illinois, Inc., AT&T Communications of Indiana, Inc., AT&T Communications of Maryland, Inc., AT&T Communications of Michigan, Inc., AT&T Communications of the Midwest, Inc., AT&T Communications of the Mountain States, Inc., AT&T Communications of Nevada, Inc., AT&T Communications of New England, Inc., AT&T Communications of New Jersey, Inc., AT&T Communications of New York, Inc., AT&T Communications of Ohio, Inc., AT&T Communications of the Pacific Northwest, Inc., AT&T Communications of Pennsylvania, Inc., AT&T Communications of the South Central States, Inc., AT&T Communications of the Southern States, Inc., AT&T Communications of the Southwest, Inc., AT&T Communications of Virginia, Inc., AT&T Communications

estimates and the methods used to compute its currently prescribed rates. In this order we consider only the rates proposed for the ISD. The rates proposed for the IXCs will be considered in a subsequent order.

II. Discussion of Issues

2. The Common Carrier Bureau issued a public notice on September 28, 1984, which outlined AT&T's petition and invited comments thereon by November 27, 1984, and reply comments by January 11, 1985. Comments were submitted by AT&T and all seven of the Regional Bell Operating Companies (RBOCs), GTE, United States Telephone Association (USTA), MCI, fourteen state regulatory commissions, and two state consumer counsel agencies. Reply comments were submitted by AT&T, three of the RBOCs, GTE, USTA, the International Communications Association, the Ad Hoc Telecommunications Users Committee, and three state commissions. In general the telephone carriers support the depreciation methods proposed in AT&T's petition and request that the use of these methods be authorized for all telecommunications common carriers. In general, the state commissions, consumer counsel agencies, and telecommunications user committees oppose the adoption of the methods proposed by AT&T.[2]

3. The commenting parties raised many issues. In this order, however, we deal only with the following issues which specifically relate to the prescription of ISD's depreciation rates: (1) Do current methods used to compute the ISD's depreciation rates provide it a reasonable opportunity to recover its reserve deficiencies? (2) If current methods are inadequate, what alternative methods should be adopted? (3) What life and net salvage factors should be used to compute the depreciation rates at issue? (4) What should be the effective date of any revised depreciation rates?

A. AT&T's Proposed Methods

4. In our final decision in *Property Depreciation*, Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), we approved the use of equal life group (ELG) depreciation methods for plant placed in service after January 1, 1981. We did not approve the use of ELG for embedded (i.e., pre-1981 vintage) plant because of the increased complexity and cost that would result and the unavailability of vintage records necessary to implement the method for embedded plant. Furthermore, we believed that the use of the remaining-life method (which was also approved in the decision) would permit 100% depreciation and, thus, make the use of ELG unnecessary for embedded plant.

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of Washington, D.C., Inc., AT&T Communications of West Virginia, Inc., and AT&T Communications of Wisconsin, Inc.

[2] Copies of these comments and reply comments are available for inspection in the Commission's Common Carrier Bureau offices.

5. In 1983 and 1984 many of the BOCs proposed a new set of depreciation procedures which they called the straight-line-age-life (SLAL) method. These procedures differ from those which the Commission uses to prescribe depreciation rates in the following ways:

(1) The ELG procedure is used for embedded plant as well as new additions, in contrast with the current policy of applying ELG to new plant additions only.

(2) Net plant weighting procedures are used with vintage reserves which are based upon allocations derived from current theoretical reserve studies. This is in contrast with the current Commission policy of using gross plant weighting procedures. In addition, in our *Supplemental Opinion and Order* in Docket No. 20188, 87 FCC 2d 1112 (1981), we found that it is inappropriate to allocate book reserves using theoretical reserve studies. In that order we stated that such an allocation must be based upon the actual debits and credits that have occurred over time.

After thorough consideration of an abundance of comments provided primarily by the carriers and the state commissions, we rejected the use of the SLAL method in our 1983 depreciation prescription orders.[3] We rejected the SLAL method for the same reasons we rejected ELG for embedded plant (See paragraph 4), and because we believed that the use of the SLAL method would result in too much volatility in the telephone carriers' revenue requirement patterns. As we stated in that order:

> . . . the use of the SLAL method would immediately raise depreciation rates for most of the BOCs by from two to three percent of their original costs. Nationwide, this amounts to approximately four billion dollars a year in increased depreciation expense. This large increase using the SLAL method would be followed by a rapid decrease in depreciation expense to less than that which would result from the existing methods by 1990.[4]

6. In its petition AT&T states that it has substantial depreciation reserve deficiencies and that if it is not allowed to use more liberal depreciation methods than those which the Commission has authorized in the past, it will not have a reasonable opportunity to fully recover its capital. AT&T proposes the following changes in the Commission's depreciation methods which it claims will enhance its chances of recovering its reserve deficiencies:

(1) The use of the ELG procedure for embedded plant.

(2) The use of net plant weighting procedures using vintage reserves which were developed in conjunction with the divestiture.[5]

7. AT&T argues that its method is not SLAL because it applies the net plant weighting concept based on vintage reserves developed in conjunc-

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[3] *See, e.g.*, Depreciation Rates, 96 FCC 2d 257 (1983), *reconsideration*, FCC Order 84-505, released October 31, 1984.

[4] *Id.* at 266.

[5] Modification of Final Judgment in United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U. S. 1001 (1983).

tion with divestiture instead of vintage reserves developed from current theoretical reserve studies. However, the vintage reserves developed in conjunction with divestiture were, in fact, based upon allocations derived from the BOCs current theoretical reserve studies.[6] As a result AT&T's proposed changes, when taken together, are the same SLAL method which the Commission has already considered and rejected.

8. Neither AT&T nor the other carriers that responded to the public notice have provided new or convincing arguments or new information that would justify a reversal of our prior orders and acceptance of the SLAL method. As a result, we reject AT&T's proposed method change. Nevertheless, because there is merit in AT&T's argument for relief, we adopt the depreciation changes described below.

B. Alternative Methods

9. We agree with several of AT&T's contentions, among them: (1) that there is a substantial shortfall in the ISD reserve;[7] (2) that competition in AT&T's interstate telecommunications markets is substantial and is increasing; and (3) that the use of current depreciation methods may not be adequate to allow AT&T a reasonable opportunity for 100% capital recovery.

10. In recent years this Commission has consistently pursued policies designed to open interstate, interexchange markets to competition.[8] The *Modification of Final Judgment* (*MJF*), *supra* note 5, was also designed to enhance competition in the interexchange service market, most particularly by the requirement that BOCs provide equal access to their local exchanges to all interexchange carriers.[9] There is evidence that AT&T is indeed experiencing growing competition. For example, in 1983, the other common carriers (OCCs) had an estimated net plant investment of some $5-6 billion as compared to AT&T's inter-city net plant Investment of $11 billion, and in 1984, the OCCs' projected construction budgets were expected to account for three-fourths of the industry's total additions for new capacity.[10] Implementation of equal access should intensify the competition faced by AT&T. The full impact of increased competition in

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[6] AT&T Plan of Reorganization, pp. 143-161, approved in United States v. Western Electric, 569 F. Supp 1057 (D.D.C. 1983).

[7] Our staff's studies show that the ISD's depreciation reserve has a shortfall of approximately 7% of its plant investment, or approximately $700 million. This is substantial by any measure.

[8] *See, e.g.*, Resale and Shared Use of Common Carrier Services, 60 FCC 2d 261 (1976), *reconsideration*, 62 FCC 2d 588 (1977), *aff'd sub nom.* AT&T v. FCC 572 F2d 17 (2d Cir.); *cert. denied*, 439 US 875 (1978).

[9] 552 F. Supp. at 188.

[10] Inquiry on Long-Run Regulation of AT&T's Basic Domestic Interstate Service, CC Docket No. 83-1147, 48 F.R. 51340 (November 8, 1983), Comments of AT&T at pg. 31.

interstate, interexchange services is likely to become evident within the next few years.

11. The continued application of the remaining-life method would not fully resolve the ISD's reserve deficiencies for from 10 to 20 years in certain accounts.[11] We anticipate that, well before that time, competition will have created an environment in which prices are largely market-driven rather than cost-driven. We cannot assume that, under such competitive conditions, AT&T could charge a market price for its services and still recover the costs represented by its deficiencies. Therefore, in order to allow AT&T a reasonable opportunity to recover its reserve deficiencies, we depart from current depreciation methods, at least for those accounts with relatively long remaining lives.

12. As an alternative to the current methods, we propose to use an amortization procedure similar to that which we recently approved for Illinois Bell[12] to resolve the ISD's reserve deficiencies for accounts that have estimated remaining lives in excess of four years. For accounts with remaining lives of four years or less, the use of existing methods (i.e., remaining-life) should be adequate. Our selection of a four year amortization period for the reserve deficiency, rather than a longer period, is based upon our assumption that within a few years after equal access has been fully accomplished, competition in the interstate market will have developed to the point where the recovery of today's reserve deficiencies will be extremely unlikely. On the other hand, a period of less than four years would have an unjustifiable impact on rates for consumers given the current competitive environment.[13] We direct AT&T to provide the data necessary for our staff to closely monitor ISD's reserves and we direct our staff to recommend any changes in the amortization period that may be warranted by changing conditions.[14]

13. Most of the local exchange carriers (LECs) which submitted comments in this proceeding propose that they be allowed to use the same methods as AT&T. In this order, however, we have addressed only ISD. Our conclusion that ISD requires a revision in the methods used to resolve

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[11] For example, our staff has estimated that the depreciation reserve deficiency for the COE-Electronic Account is approximately $110 million, and its estimated remaining life is 13 years.

[12] *See, e.g.*, Order FCC 84-620, released December 19, 1984.

[13] As we stated in *Depreciation Rates*, 96 FCC 2d at 273, our objective in establishing an amortization schedule is "to write off the investment in a timely manner while not overly distorting the income statement of any given period." For example, if a 2 year amortization period were used, the carrier's annual revenue requirement would increase by nearly $200 million.

[14] Competitive conditions in the interstate transmission market are, of course, among the matters in issue in our ongoing Long-Run Regulation proceeding, CC Docket No. 83-1147, *supra* note 9.

its reserve deficiencies is based on considerations peculiar to ISD and is without prejudice to any determinations we might make in the future regarding depreciation methods to be used by individual LECs and AT&T's 22 IXCs.[15]

C. Life and Salvage Factors

14. After reviewing AT&T's equipment life and net salvage proposals, the underlying data, and the comments in response to the public notice, our staff developed a set of life and salvage factors for the ISD plant. Accordingly, we concur in the life and salvage recommendations of our staff as reflected in the depreciation rates shown in the Appendix.

D. Effective Data

15. AT&T requested an effective date of January 1, 1985 in its petition. As AT&T's request is in accordance with our rules[16], and there were no comments in opposition to the proposed effective date, we grant AT&T's effective date as proposed.

III. Ordering Clause

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. 4(i) and 220(b), That the revised depreciation percentages and amortization periods set forth in the Appendix to this Order are prescribed effective January 1, 1985.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[15] We wish to make clear that our rationale for granting AT&T this relief does not necessarily apply to the exchange carriers. We recognize that the LECs also have reserve deficiency problems as indicated in their comments in this proceeding. While we have nothing before us to address this at this time, we have previously indicated that, on a case-by-case basis and with the concurrence of the appropriate state commission, we will entertain requests from the LECs for permission to use the amortization approach for the elimination of the LEC reserve deficits in embedded plant. *See* Order FCC 84-620, released December 19, 1984. Such an approach would take into account the regional differences in operating environment, plant modernization, and rate impact which exist for each LEC and in each state jurisdiction.

[16] See section 43.43(e) of our Rules.

FEDERAL COMMUNICATIONS COMMISSION

Schedule of Annual Percentages of Depreciation and Amortization Amounts for AT&T Communications - Interstate Division

Acct. No.	*Class Or Subclass Of Plant*	*Remaining Life*	*Future Net Salvage*	*Reserve*	*Remaining Life Rate*	*Annual Amortization Expense*	*First Elg Year*
		(YRS)	(%)	(%)	(%)	($000)	
A	B	C	D	E	F	G	H
212	BUILDINGS	22.0	4.	32.00	2.9	2,278	1983
221.1	MANUAL	6.4	-11.	62.11	7.6	2,717	—
221.4	CROSSBAR	2.6	0.	47.19	20.3	14,845	—
221.5	CIRCUIT OTHER	7.8	-1.	31.11	9.0	10,804	1983
221.51	DDS CIRCUIT	8.6	-4.	31.89	8.4	—	1983
221.67	RADIO	9.3	-10.	39.39	7.5	48,751	1983
221.79	ELECTRONIC	13.1	1.	23.65	5.8	28,351	1983
221.867	SAT RADIO	8.9	0.	11.00	10.0	1,135	1983
234	LARGE PBX	6.2	-2.	45.01	9.2	101	—
241	POLE LINES	7.9	-29.	88.18	5.2	—	1982
242.1	AERIAL CABLE	4.4	8.	80.21	2.7	249	1985
242.2	UG CABLE	16.2	-2.	47.25	3.4	5,134	1982
242.3	BURIED CABLE	11.2	-4.	62.40	3.7	36,243	1982
242.4	SUBMARINE CABLE	14.7	-2.	39.52	4.3	987	1982
243	AERIAL WIRE	9.8	-73.	92.22	8.2	189	—
244	CONDUIT	36.0	-6.	38.20	1.9	995	1985
261	FURN & OFF EQPT	16.2	4.	16.05	4.9	—	1983
261.3	COMPUTERS	5.8	10.	29.21	10.5	—	1983
262	OTHER COMM EQPT	7.1	0.	11.84	12.4	756	—
264.1	MOTOR VEHICLES	4.2	14.	46.81	9.3	—	1983
264.3-5	TOOLS & OWE	10.2	3.	39.07	5.7	—	1985

For accounts in which annual amortization expense figures are shown in Column (G), Column (E) contains the theoretical reserve percentage, for all other accounts, Column (E) contains the book reserve percentage.

Common Carrier, Investigation by FCC
Common Carrier, Rates, Cost Justification

ACCUNET Packet Service offering by American Telephone & Telegraph Co. is determined after investigation to provide service on preferential terms to AT&T-IS, the wholly owned subsidiary of AT&T. AT&T is required to remove offering as presently structured within 120 days, or establish accounting methods that will assign risk of revenue shortfall to shareholders rather than regulated service ratepayers.

—AT&T Communications, Inc.
CC Docket No. 84-906

FCC 85-330

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AT&T Communications, Inc.	CC Docket No. 84-906
Revisions of Tariff F.C.C. Nos. 260, 266, 267, 268, 270, 273, and 274 To Establish Rates and Regulations for ACCUNET Packet Service	Transmittal No. 148

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 1985; Released: July 22, 1985

BY THE COMMISSION:

I. Introduction

1. The Commission here considers the record developed by the Common Carrier Bureau in its investigation of American Telephone and Telegraph Company's ACCUNET Packet Service (APS), allowed to take

effect by Commission Order released September 19, 1984.[1] For reasons stated in more detail below, we find that the record demonstrates that AT&T Communications' (AT&T-C) provision of APS under the present rate structure operates to burden subscribers to AT&T-C's other regulated services unreasonably, and to grant an unreasonable preference to AT&T's separated subsidiary, AT&T Information Services (AT&T-IS — formerly American Bell, Inc.), in its provision of packet services. These fundamental concerns with AT&T's packet service offerings and they should be resolved without further delay to minimize potential disruption of service arrangements. We will therefore require that AT&T-C remove the APS offering as presently structured from its Tariff No. 4. This action is without prejudice to AT&T-C tariffing a functionally equivalent basic packet service under a reformed rate structure, as described in the discussion; nor is AT&T-IS constrained in its service offerings. As the Commission permits AT&T-IS to resell basic AT&T services as well as provide enhancements,[2] the provision of a generally available packet service by AT&T does not require that it first be made as a regulated offering — whether bundled or unbundled.

II. Background

2. The following summary of AT&T's past efforts to provide a packet switched offering sets forth the Commission's specific concerns explored

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[1] AT&T Communications, Revisions to Tariff F.C.C. Nos. 260, 266, 267, 268, 270, 273 and 274 (ACCUNET Packet Service), FCC 84-421 (*September 19 Order*). APS was later relocated to Tariff F.C.C. No. 4. (Transmittal Nos. 240, filed December 4, 1984, and 286, filed January 17, 1985, both effective January 30, 1985.) The record developed subsequent to the *September 19 Order* includes the Bureau's letter of April 1, 1985 to AT&T, the carrier's response received April 15, 1985, and comments on the response submitted by International Business Machines Corporation (IBM), Tymnet, Inc. (Tymnet), GTE Telenet Communications Corporation (Telenet) and US Telecom, Inc. (Telecom). AT&T submitted its reply May 16, 1985.

In addition to the record developed during the investigation, we have considered petitions for reconsideration of the *September 19 Order* permitting the tariff revisions to take effect. Petitions were submitted by GTE Telenet Communications Corporation, UNINET, Inc., Tymnet, Inc., MCI Telecommunications Corporation, and International Business Machines Corporation. Beyond renewing arguments addressed in the September 19 Order, the petitions' sole new contention is that certain language in the Order established a new, more difficult standard for petitioners seeking suspension of dominant carriers' tariff filings. However, no new standard of review to determine the appropriateness of suspension and investigation was adopted by the Commission, nor was any alteration of Commission review procedures generally affecting dominant carriers implied. These petitions are moot as a result of the investigation concluded by this Order and will, therefore, be dismissed.

[2] American Telephone and Telegraph Company (Provision of Basic Services Via Resale by Separate Subsidiary), 98 FCC 2d 478 (1984), *petition for stay denied*, FCC 84-442, Sept. 24, 1984 (*AT&T-IS Resale Order*).

in the investigation. Packet service is not a new technology; the first packet-based network was granted in 1973.[3] AT&T itself proposed in 1978 to employ packet switching technology as part of an integrated service, Advanced Communications Service, that would include both data features and transport capability. AT&T later withdrew that proposal, citing software development difficulties as well as concerns that the Commission would consider the offering an enhanced service. The successor proposal, Bell Packet Switching Service, was limited to the separate provision of packet switches and ports, so that customers were required to obtain transmission lines and switching capability separately to configure private packet networks. That proposal was rejected by the Commission on the ground that AT&T had failed to obtain the underlying facility authorizations necessary to provide a service that created new channels of communication. *American Telephone and Telegraph Company* (Bell Packet Switching Service), 91 FCC 2d 1 (1982) (*BPSS I*). The Commission at that time also stated the fundamental concerns that have recurred in successive versions of the offering: (i) that AT&T's packet service favors the carrier's subsidiary (AT&T-IS) either by terms of the offering or the physical colocation of facilities; and (ii) that the offering is not structured or priced to be generally available or useful, or, if general in terms, nonetheless restricts the creation of independent competitive offerings.[4]

3. The Commission allowed AT&T's subsequent proposal, renamed Basic Packet Switching Service, to take effect, stating that revisions to the original proposal had generally satisfied two broad considerations: that basic and enhanced services be sufficiently demarcated that revenues from traditional common carrier services would not artificially subsidize enhanced AT&T offerings, and that regulated network offerings of basic AT&T services would implement technological improvements and innovation. *American Telephone and Telegraph Company* (Basic Packet Switching Service), 94 FCC 2d 48 (1983) (*BPSS II*). In effect, the Commission was essentially satisfied that, as restructured, the BPSS offering would establish a "building block" for enhanced service offerings by a variety of service providers, including but not limited to AT&T's enhanced service subsidiary. As part of the service restructuring, for example, AT&T-C had applied the same charge to customers who connected their own packet switches through AT&T transmission services as to customers who obtained both switching and transmission from

[3] Packet Communications, Inc., 43 FCC 2d 922 (1973).

[4] The Commission's decision to permit AT&T-IS resale of basic AT&T-C offerings subsequently reaffirmed "the *Second Computer Inquiry's* prohibition on [AT&T-C] supplying any services or facilities to AT&T-IS other than through general tariffed offerings." *AT&T-IS Resale Order*, 98 FCC 2d at para. 19.

AT&T.[5] The restructured offering also allowed unrelated users to share a BPSS facility and provided 9.6 kbps ports in addition to 56 kbps ports. These changes allayed the Commission's concern that the service was so structured as to discriminate unreasonably on a continuing basis in favor of large users, such as its own subsidiary, and to discourage the more general availability of BPSS to smaller users. The Commission suggested, however, that while economic justification for a particular structure might arise from first meeting the more specialized needs of large users, "one way to make BPSS a more generally useful service offering would be to develop it into a fully implemented common user service that could be tariffed on a message use basis." 94 FCC 2d at 60.

III. The Investigation

4. The instant investigation arose from Commission review of AT&T's Transmittal No. 148, which renamed BPSS as ACCUNET Packet Service (APS) and, among other things, bundled AT&T's packet switches and interswitch transmission lines. *See September 19 Order, supra* note 1. As a result APS permitted users for the first time to share transmission lines as well as switching under AT&T's basic packet service offering, and pay usage charges rather than subscribe to lines and switches on a monthly basis. The rates for installation, port usage, and minimum and actual

[5] At that time, AT&T's private line rate structure did not generally distinguish between services terminated at customer premises and at telephone company central offices; private line service was priced as a dedicated channel between service points designated by the customer. The AT&T packet service offering, in its earlier version, departed from this traditional approach and priced connections to BPSS switches quite differently, depending on whether the connection was made at an AT&T central office or a customer premise. In allowing the revised BPSS proposal to take effect, the Commission stressed the importance of maintaining impartial rate treatment of BPSS terminations in the AT&T central office and at customer premises. "AT&T has a clear incentive to discriminate in favor of BPSS when pricing the associated private line channels to the detriment of other enhanced service providers who also rely on AT&T transmission services." BPSS II, 94 FCC 2d at 65.

A fundamentally different private line pricing regime was implemented by AT&T Tariff Nos. 9, 10 and 11, which became effective April 27, 1985. American Telephone and Telegraph, Tariff FCC Nos. 9, 10 and 11, FCC 85-221, released May 28, 1985 (*May 28 Order*). The revised structure, which comprises DDS transmission channels but as yet includes no packet service offerings, prices private lines on the basis of arrangements between the AT&T central offices and the local distribution circuits used to reach them, and so implements such distinctions on the basis of the underlying facilities used to provide service in particular instances. The new structure applies these pricing distinctions to a wide range of services. Rather than singling out an individual offering's central office terminations for special treatment, the new rate structure generally recognizes the physical facilities involved in particular circuit arrangements, such as the use of DDS channels for ACCUNET access. As discussed below at fn. 43, however, the presently effective APS offering still raises problems in this regard.

usage were all reduced from existing BPSS levels. A primary purpose of this investigation is to determine whether the revised, bundled offering will fully recover its costs.[6] The failure to do so, of course, would burden AT&T private line ratepayers with APS' operating losses. A second, but no less important focus is the APS service's relationship to AT&T-IS. APS conceivably could recover its costs, while still employing a rate structure and rate levels that unreasonably favor the AT&T-IS subsidiary and its own competitive posture in the market for enhanced packet services. To the extent that the service enables AT&T-IS to obtain digital transmission below rates for that component confronted by its competitors, AT&T-IS would be improperly subsidized. This latter issue involves both a comparison between the rates effectively imposed for transmission under APS with the tariffed rates, and assessment of the APS structure to determine if it otherwise operates to discourage packet service competitors' use of transmission channels provided in that form.

5. As noted, the Commission had expressed concern in both *BPSS I* and *BPSS II* that AT&T be prevented from favoring AT&T-IS' enhanced service offerings through preferential pricing of basic transmission services. Thus, if APS, as restructured, "were either directly or indirectly [provided] for the benefit of its separate subsidiary, then it ought not to be offered on a regulated basis." *September 19 Order* at para. 16. Such an offering would unreasonably discriminate against other customers, including AT&T's packet service competitors, and would do so at the expense of other private line ratepayers, whose rates would be increased by the necessity of supporting preferential rates for AT&T-IS. We stated in the *September 19 Order* that if investigation established these charges against ACCUNET, "we would consider suitable steps to remedy this situation, including the elimination of AT&T-C's packet [service] as a

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[6] Transmittal No. 148, as described in the *September 19 Order*, was AT&T's third attempt to implement the proposed revisions. Its rate comparability study compared the proposed APS rate with rates required to recover then-effective private line circuit rates. The subsequent comparability study submitted by AT&T with its reply in this investigation is predicated on the generally lower rates that took effect April 27, 1985, and our own comparability analysis relies on the same rates.

The BPSS II kilopacket usage rate of $1.35 was reduced to $0.82 per kilopacket under APS, and the APS rate was further reduced for high volume usage to as little as $0.67 per kilopacket. Port charges of $850 (9.6 kbps) and $1,200 (56 kbps) in BPSS II were reduced to $615 and $1,065, respectively in APS. The charge for virtual call requests under BPSS II was $.0068 and under APS $.00336. The minimum port usage charge under BPSS II (56 kbps) was $1,090; APS reduced this charge to $870. The net effect of these and other changes was to price the bundled APS service below previous charges imposed for the BPSS II switching functions alone.

regulated offering." *Id.*[7]

6. These concerns were prominent in our review of Tr. 148 because the rates proposed there for bundled APS service were dramatically reduced from the previous BPSS II rates. The APS tariff reduced the usage rate from $1.35 per kilopacket for BPSS to $.82 per kilopacket. The reduction is even more substantial than first appears, because the reduced usage charge for the first time includes the interswitch trunking channels that BPSS customers were formerly obligated to obtain under a separate tariff. In addition, the APS structure provides both declining block and non-business-day rate discounts, which favor large users and those able to shift their usage to off-peak periods. While, as noted, the carrier provided a rate comparability study purporting to establish that these rate differences recovered underlying costs, the data supplied with Tr. 148 did not sufficiently disaggregate investment and expense data for the switching and transmission facilities to enable the Commission to calculate equivalent revenues based on the number, length and speeds of channels employed in ACCUNET. The Fully Distributed Cost analysis provided by AT&T also predicted impressive revenue gains from 1983 ($151,825) to 1984 ($2,090,000), but without explaining the development of these estimates, or justifying the carrier's projection of cumulative APS revenues exceeding $270 million by 1988. In light of AT&T's past over-optimistic projections for BPSS,[8] the Commission was concerned that unduly optimistic demand estimates not result in under-recovery of service costs, which would both burden other AT&T ratepayers and have anticompetitive consequences for the packet switched market.

A. The Bureau Letter

7. The Bureau's April 1, 1985 letter to AT&T accordingly requested (i) disaggregated data indicating investment and expenses incurred to provide APS; (ii) updated forecasts for the deployment of node and transmission components; (iii) updated revenue and earnings information,

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[7] The Commission also determined that use of digital transmission facilities in conjunction with packet switching did not exceed the scope of AT&T-C's authorization under Section 214 of the Communications Act, 47 U.S.C. § 214. Although customers did not obtain DDS service under tariff for their processor node connections, as in the previous BPSS structure, the combination of switches and transmission in the renamed APS fell within the Commission's 1974 conditions (*Data Under Voice*, 50 FCC 2d 501, 511) permitting use of the facilities for end-to-end digital data services. While we need not reach the issue here, we point out that such a grant of Section 214 authority to offer end-to-end common carriage services may not be applicable to the extent that an offering is properly viewed as a specialized, non-general offering of a service to AT&T-IS on preferential terms. See also fn. 3, *supra.*

[8] BPSS revenues in 1983 were $151,825, against expenses of $637,846 and investment of $1,065,108. These revenues were 5.5 percent of the projected revenues provided with illustrative tariff pages filed as part of Transmittal No. 59. See also para. 19, *infra.*

and forecasts of costs, revenues and earnings; (iv) service demand reports, including a study of peak demand and a breakdown of demand by speed and packets; (v) comparison of AT&T-IS use of APS with other customers; and (vi) usage rates necessary to generate a 12.75 percent return in 1984, 1985 and 1986.

8. Rather than burden this Order with a seriatim discussion of each topic of investigation, the discussion following takes as its primary focus the projected demand for APS service, which bears directly on prospects for its generating revenues sufficient to cover costs, and the related issue of AT&T-IS use of the service. Examination of these issues, and the related question of rate comparability, is sufficient to decide the issue before us. Other information obtained during the investigation is noted as appropriate.

B. The AT&T Response

9. The AT&T-C response describes APS performance, based on six months' experience under the new tariff, that is disappointing in its import for the Commission's concerns. For the period from September 1984 to February 1985, APS experienced an operating loss of $1.37 million, for a return of -43.49 percent. This represented an overall shortfall from projected demand of approximately one-half. AT&T-IS usage — still the predominant segment of APS — was also approximately half of the projections made in Tr. 148; as a result, the carrier's overall revenue projections for the first year's operations of $2.29 million have been scaled down in the most recent projections to $1.03 million.[9] AT&T-C now projects that after 12 months' experience, revenues will be slightly less than half those predicted in Tr. 148 and investment and expense levels will be substantially higher, due to "accelerated network deployment."[10] This adjustment would result in a -58.46 percent return for the first year, compared to the Tr. 148 estimate of -5.8 percent. For 1986, AT&T in Tr. 148 estimated a 23.7 percent return, and now estimates 3.93 percent, while projecting a 29.12 percent return for 1987. These figures, of course, all reflect AT&T-C's pricing of transmission lines at their putative embedded cost.[11] AT&T-C, however, projects an imminent turnaround in succeeding

[9] Even this more conservative figure is questioned by petitioners, who note that the first six months' actual APS revenues were $300,608. As APS' actual revenues for the first two months of 1985 and projected revenues from March through August total $840,025, it appears the final four months of 1985 are expected to generate $2,460,000 — more than twice the revenues expected for the first 12 months of the offering.

[10] AT&T-C projects that installation of the 28 switches composing the core network for APS will be completed by the end of 1985.

[11] AT&T-C's decision to price transmission components used in APS on the basis of embedded cost has been hotly disputed since the initial proposal. Even at the lower prices which result from this methodology, however, comparatively massive demand must be postulated to recover the costs of service. The rate comparability discussion at para. 23,

months, reflecting orders for service to be implemented by the end of June, and asserts that added customers and orders will increase APS revenues sufficiently to validate the revised first year revenue projections, and also to reduce the present large portion of APS demand attributable to AT&T-IS. (Were APS transmission facilities priced consistently with the underlying rates, demand would presumably be repressed by the higher rates for transmission.)

10. AT&T-C explains its failure to meet the most recent Tr. 148 projections as due to delays in implementing the tariff, and in deploying the core network that will make APS more attractive to potential customers. It also, as noted, extends the requested projections of future demand through 1987, so that the anticipated -58.46 percent return in 1985 and the 3.93 percent return now forecast for 1986 can be aggregated in a longer perspective.[12] AT&T-C projects a return on APS in 1987 of 29.124 percent, based on revenues of $60.6 million. The credibility of the revised demand estimates furnished in the investigation, as petitioners iterate at length, is central to AT&T-C's repeated assertions that present APS rates are sufficient on a cumulative basis to recover the cost of providing service; a significantly diminished demand for APS would seriously compromise this prediction.[13]

11. The response also establishes that,, to this point, AT&T-IS remains the predominant customer for the service. While AT&T-C describes service orders scheduled to commence through June that would reduce AT&T-IS' share of APS revenue to approximately 60 percent, the actual share for February, 1985 — the last month for which actual billings are available — was 94.8 percent. Non-AT&T-IS demand through February 1985 accounted for 0.78 percent of total usage (by kilopackets) and 3.85 percent of total revenues; as of April 5, 1985, APS served four non-AT&T projects that used 17 lower-speed ports, primarily 9.6 kbps ports. Nonetheless, AT&T anticipates that non-AT&T-IS demand will constitute 40 percent of the total APS revenues by the end of June, 1985. The latter figure does not include AT&T's use of APS for internal communications

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and the carrier's calculation of rates that would be necessary to earn 12.75 percent on the service, demonstrate the extent to which changes in either pricing or aggregate demand for APS affect its cumulative profitability over the three-year period.

[12] As the initially proposed effective date for APS of May 5, 1984, was delayed by Commission review for three and a half months, AT&T's revised projections have effectively extended the target for ultimate APS profitability by three-quarters of a year.

[13] As Telenet observes, the effect of extending projections to 1987 on the calendar-year basis is to make direct comparisons between ATTCOM's recent projections and those submitted initially with Transmittal Nos. 59 and 148 impossible. The imperfections of the resulting comparisons, noted below in Chart I, do not impede our analysis. Where possible, however, such shifting bases for projections should be avoided.

— an application anticipated by AT&T in its 1982 proposal.[14] The prospects for increased non-AT&T-IS use are based on projections from these recent orders, completion of the core network of 28 switches, expansion of access to APS by the impending provision of 2.4 kbps ports, development of Bell Operating Company (BOC) services for asynchronous terminal access to packet networks, and AT&T's provision of the X.75 interface enabling connection of APS with other packet networks. In this respect, however, just as with aggregate demand, the external circumstances affecting AT&T's projections for substantial APS use by non-AT&T-IS customers are a central element in assessing the reasonableness of these projections.

B. Comments

12. Commenters, who generally provide enhanced packet services in competition with AT&T-C's offering,[15] reiterate contentions made during initial review of the APS proposal. They assert that demand for APS is overstated by AT&T-C's forecasts, and that costs are understated both by AT&T-C's reliance on embedded cost pricing of transmission facilities (reflecting the cost of facilities dedicated to APS rather than a cross-section of facilities appropriate for this service, with attendant system overhead costs), and its failure to disaggregate expense and investment components more specifically. As a result, commenters state, the APS rate structure will not recover costs except in the unlikely combination of circumstances that AT&T-C's demand forecasts are vindicated, and that it is allowed to continue APS' pricing of transmission components on an embedded cost basis, rather than on the tariffed rates for equivalent components. The rate comparability study provided with Tr. 148 is again challenged as deficient in several respects, and commenters contend the Commission's recent action permitting the BOCs to provide protocol conversion services at the central office[16] — on condition that BOC transmission lines be priced as if separately provided — requires that AT&T adopt a similar pricing mechanism for its basic packet offering's use of channels available under AT&T-C tariffs as private line service. Absent such rate reform, they argue, the asserted subsidy to AT&T-IS

[14] BPSS I, at 10-11.

[15] AT&T's competitors provide packet service that includes the function of converting customers' ASCII/RS-232-based communications to the X.25 protocol used internally by packet service networks. Larger customers, such as AT&T-IS or major end users, may perform protocol conversion internally, but the anticipated growth in packet service sales to smaller users with terminals or personal computers lacking X.25 capability requires that the protocol conversion function be supplied in addition to the underlying X.25-based network available under APS.

[16] Pacific Bell et al., Petitions for Waiver of Section 64.702 of the Commission's Rules, FCC 85-101, released Mar. 26, 1985 (*Protocol Waiver Order*).

will continue, burdening AT&T ratepayers and unreasonably discriminating against AT&T-IS' competitors by subjecting them to the type of "price squeeze" identified in the *Protocol Waiver Order.* Note 16, *supra.*

IV. Discussion

13. Permitting AT&T-IS to resell basic services, including packet service, enables a resolution of the more troublesome aspects of such an offering. While requiring that AT&T-C offer a basic service at rates comparable to existing tariffed component rates could both restrict the initial offering to a limited class of users and curtail prospects for eventual broader availability as a general offering, the ability of AT&T-IS to offer such services on a separate basis, under a rate structure unconstrained by comparability or cost support requirements, enables the Commission to maintain consistent pricing of underlying functional components — the "building blocks" of such services — without precluding AT&T from pricing competitive offerings through AT&T-IS to meet a specific situation.

14. The Commission's concern with cost shifting inherently confronted a broad constraint: without at least temporarily accepting the prospect of such cost shifting, there was no approved mechanism by which AT&T could introduce such a service. In that context, the reasonableness of AT&T's demand estimates and cost support materials (or comparability studies), intended to establish that the packet service would become self-supporting in a reasonable period and would not effectively undermine the principles of *Computer II,*[17] were the prime focus of Commission review, including the present investigation.

A. Demand Forecasts

15. AT&T-C explains its most recent, revised projections for APS in part by describing the efforts undertaken to project demand accurately during initial design of the service. When it determined there was a marketplace need for a common user packet switched service,[18] the absence of existing basic packet service providers made estimation of potential demand more than usually difficult. End users could estimate their demand for such an offering only in terms of the specialized "value-added" (*e.g.*, protocol converted) offerings already available from en-

[17] Second Computer Inquiry, 77 FCC 2d 384, 474, *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Indus. Ass'n v. F.C.C., 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983) (*Computer II*).

[18] The Commission had encouraged AT&T to structure APS as a "common user" offering of more general utility for smaller users. The bundling of switching and transmission components into a rate element priced on a usage basis, however, even if separately desirable, does not render rate comparisons between the bundled components and the tariff rates applied to their unbundled functional counterparts irrelevant. (As described below, the market acceptance of a general X.25 based offering is open to question.)

hanced service providers, while AT&T-C was constrained by the *Computer II* separation requirements to offer a basic service, leaving the provision of enhanced offerings to AT&T-IS. AT&T-C therefore relied, in addition to market surveys, on a "Delphi session" of communications consultants conducted in April 1983. The participants concluded that demand for such a service had been understated in several published forecasts, and provided AT&T with a three-tiered forecast for industry demand; AT&T adopted the more conservative forecast in its subsequent proposals. The underlying conclusion of the participants was that the development of higher-speed digital transmission facilities, shifts to public data networks, and growth of personal computer sales had fundamentally altered the prospects for packet switched transmission.[19]

16. The problematic nature of projections in the packet switched context is resoundingly confirmed by AT&T's experience, in which projections prepared for successive versions of its basic packet service have proven optimistic. The common thread in AT&T's several efforts at projection is the belief that, however disappointing market response to date, the service will post stunning gains in the third year that will compensate for the first two lean years. Predictions for APS third-year revenues consistently exceed a tenfold increase over the introductory year's performance.

17. In providing APS since the most recent revisions took effect, AT&T has again encountered demand and revenues far short of projections. Whatever the effect of implementation delays caused by thorough and well-warranted Commission review of the proposal this divergence is the most recent in a long series of packet service forecasts that experience has proven overly optimistic. The comparison of revenue estimates the 1984 in successive filings with actual results below perhaps most demonstrates the gap between optimistic projections and experience.[20]

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[19] This assessment has not been altered by AT&T-C's subsequent experience, according to affidavits submitted by the "Delphi session" participants with AT&T's reply.

[20] The 1984 data from Tr. 59 appear to represent an "annualized" year derived from projections for the period March 1984 through March 1985. The 1984 figures for Tr. 148 and the investigation response appear to be predicated on the period September 1984 through August 1985.

Chart I. AT&T Revenue Projections and Actual Revenues ($M) Compared

Filing	*1982*	*1983*	*1984*	*1985*	*1986*	*1987*
BPSS I	.562	4.464	6.98			
BPSS II		2.761	14.265	37.360		
Tr. 59			2.094		37.010	
Tr. 148			2.300		41.080	
4/15 Inv. Resp.				3.300	25.300	60.600
Actual	.152					
Actual (9/84-2/85)		.301				

While, as noted, we cannot reasonably expect precision in such estimates, efforts to foresee demand become increasingly tenuous as the time period extends into the future. The record so far suggests that the 1987 APS projection is speculative at best, and most probably overstated.

18. AT&T-C refers to the stimulation of demand it expects from additional packet service entrants, but such entry may also encroach on its ability to garner its projected market share. AT&T also states its intention to develop service arrangements with BOC-provided local services furnishing protocol conversion, so that customers with asynchronous and X.25 terminals on the same circuit can make convenient use of AT&T-C's X.25-based service. As Telenet observes, however, the record in the recent Protocol Waiver proceeding described significant constraints on demand by smaller users for unconverted X.25-based packet service;[21] it thus seems reasonable to question (i) how many potential smaller customers using asynchronous terminals, including personal computers, will be attracted to such offerings; and (ii) how many enhanced service providers, other than AT&T-IS, have not already invested in packet switching computers with integral protocol conversion, and so are still potential customers for such a service.[22] Given the uncertainties of this

[21] See Protocol Waiver Order, *supra* fn. 16.

[22] The Protocol Waiver Order notes (at para. 21) that when deployment of private packet switched networks began in the mid-1970's, vendors recognized that the majority of existing terminals and computers that might employ such networks used the asynchronous interface, and thus built into their systems packet assembler/disassembler devices ("PADs") with inherent protocol conversion capabilities. At present, according to Northern Telecom, the purchase price of packet switching equipment is minimally affected by the inclusion of protocol conversion capabilities, although operation of such a switch is significantly more efficient when protocol conversion is not performed. Protocol Waiver Order at para. 51. Given this history and the modest incremental cost of enhancing a packet service network when initially configured, the incentives for economic utilization of a packet service not involving protocol conversion appear uncertain at best. We must also question how the prospective sources of increased demand described in (i) and (ii) would be altered if APS rates better reflected the underlying private line transmission rates confronted by competing carriers. See para 22.

developing market and the apparently limited appeal of an X.25-based service to smaller users lacking independent protocol conversion capabilities, it appears that future growth of APS will continue to be substantially influenced by internal AT&T use of the offering and sales to AT&T-IS. Other enhanced service providers, using transmission facilities obtained in the open marketplace, have provided packet service for some time.

19. AT&T-C's projected 1987 demand figures also represent a significant portion of the overall market. Telenet, for example, interprets published estimates to suggest that AT&T's demand projections for 1987 represent more than the entire packet switching market for 1986, and over 80 percent of the 1987 market. AT&T-C vigorously challenges those estimates, contending that its anticipated demand actually represents a more modest portion of reasonable assessments of overall demand. AT&T-C states, for example, that its initial (Tr. 59) estimates of total cumulative revenues for APS from 1983 to 1988 of $270 million should be viewed in light of estimates of overall Value Added Network industry revenues for 1988 of $1.5 billion,[23] and a published estimate of $2.176 billion for 1988.[24] Our point here is not to attempt a resolution of these competing projections, but to note the significant elements in AT&T's environment that suggest its most recent forecasts are not inherently any more persuasive than past ones. In light of the comments by established competitors, and recent entry by others,[25] AT&T's confidence may not be entirely warranted.[26] A moderated projection for 1987, based on demand shortfalls from current projections of 50 percent in both 1986 and 1987, would present the following financial picture:

Chart II. Moderated Projection: .50 percent Demand Shortfall; Embedded Cost[27]

Year	*Revised Revenues*	*Expenses (Embedded)*	*Net Op. Income*	*After-Tax Income[28]*	*Cumulative Loss*
1985	$3.3M	$15.449M	($15.416M)	($6.352M)	$6.352M
1986	$12.650M	$24.143M	($11.493M)	($6.206M)	$12.558M
1987	$30.300M	$37.745M	($7.445M)	($4.020M)	$16.578M

[23] "Users to See Plethora of New Packet Services," Data Communications, Apr. 1985, at 45-46.

[24] Communications & Distributed Resources Report, Vol. 8, No. 7, Dec. 1984, at 7.

[25] "MCI Launches Packet-Switched & Software-Defined Networks," Communications Week, May 13, 1985. MCI's Data Transport service will reportedly support both X.25 and asynchronous protocols.

[26] Indeed, the third-year revenue projections in the most recent submission exceed first-year figures by an increased multiplier, despite the intervening disappointments and the absence of concrete evidence that packet service offerings in general are likely to grow at an even faster rate than AT&T's own previous estimates.

The cumulative burden on private line ratepayers through 1987 of these demand shortfalls would be $16.578 million, and this takes no account of the additional burdens improved by pricing APS service on the embedded-cost basis rather than rates derived from tariffed basic transmission services. To estimate the latter aspect the Commission has sought comparability analyses.

B. Cost Recovery

20. A rate comparability study assists in determining whether a proposed pricing regime covers associated costs. It achieves this indirectly, by comparing revenues predicated on the proposed regime with revenues expected were the same service's component elements differently priced — *i.e.*, consistently with an existing tariff.[29] In the present context, the purpose of a comparability study is necessarily limited to determining whether the APS pricing regime generates revenues for transmission channels so deficient that, measured against comparable tariff rates, they cannot reasonably be presumed to recover the carrier's cost of providing transmission service.[30] As the emphasis is on different pricing regimes applied to identifiable service components, the comparability study does not alter other variables (such as demand, which would be affected by pricing changes) in order to avoid distorting the rate comparison. While the revenues obtained under different pricing regimes will reflect demand changes in response to pricing changes, the underlying costs are not directly affected by pricing differences.[31] A comparison of returns achieved under different pricing regimes can of course be

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[29] There are outstanding questions involving the tariff rates used for comparative purposes, as noted in the May 28 Order, but they do not seriously affect this analysis.

[30] The comparability analysis referred to in the discussion below is predicated on AT&T's calculations contained in its Reply. Because APS' use of transmission facilities is specified in detail (in the response at 7-11), it is possible to price out those facilities under tariff rates for comparative purposes. The Commission staff's independent calculations generally accord with the comparability estimates by AT&T in its Reply and Telenet in its petition, based on private line transmission rates.

AT&T here elected to characterize APS as a private line service; additional, significant issues would be raised were such a "common user" offering proposed to be created from components available under the private line tariffs and tariffed under switched service tariffs. Functionally equivalent circuit components cannot be repriced solely on the basis of a characterization of the service employing them as "common user."

Comparability studies for other components of the APS service have not been performed. We discuss below the remaining deficiencies in the record which should be resolved in any subsequent packet service filing.

[31] There are, of course, potential cost differences resulting from economies of scale, and these are implicated in APS by the demand projections generally and the use of APS for internal AT&T communications specifically. To recognize these differences directly in a rate comparability study, however, would defeat its purpose.

derived from such a rate comparability study, and is relevant to the determination of overall service profitability. The primary function of the comparison, however, is to satisfy ourselves that private line offerings using common functional components price those components with reasonable consistency.[32]

21. Even accepting AT&T's revised demand forecasts arguendo, the replacement of embedded cost rates with tariff-based rates for transmission components alone would result in a cumulative deficit for APS, and dramatically diminished earnings in the later years:

Chart III. Cumulative Earnings: AT&T Demand Estimates, Repriced at Tariff Rates for Transmission Components

	1985	*1986*	*1987*	*Total*
Net Earnings	($7.533M)	($2.722M)	$7.836M	($2.419M)

The cumulative deficit burden of pricing APS transmission components at tariff-based rates would thus be $2,419 million through 1987, if AT&T's demand projections were realized. These calculations, however, reflect only transmission pricing; there are additional cost recovery concerns not answered on the present record which should be satisfied in any subsequent proposal.[33] First, because the investment and expense information initially supplied by AT&T-C with its investigation response is more aggregated in some respects than that provided with Transmittal

[32] The comparability studies furnished by AT&T-C do not separately treat transmission channels employed for AT&T's internal communication usage. This presumably reflects the transfer within AT&T of monies for internal uses on the same embedded-cost basis used for external pricing of APS. However, whatever the cost basis employed, this internal use raises the same cross-subsidy concerns evident in the structure's potential impact on external customers. The record does not sufficiently establish how APS is provided for internal uses, nor does it specify the provisioning of switches and other equipment for internal use — equipment that in the tariffed context necessarily entails designation of central offices in Tariff No. 10 as APS pricing points. There is thus no basis for determining the relationship of the two "networks" allocated to different types of use that, combined, make up APS. We cannot resolve these matters on the present record, but if the internal use of APS does not benefit private line ratepayers generally, or if internal use does have general benefits but is disproportionately burdened with costs more properly allocated to external customers (as, e.g., compared with cost loadings under prior internal network arrangements), the internal use of APS could result in the misallocation of costs between the internal and external networks. These unresolved matters raise similar concerns to those implicated by the APS rate structure which, in the broader context, has so far failed to burden AT&T-IS with rates comparable to those faced by its competitors.

[33] AT&T-C's April 15 response also contains, as requested, calculations of the rates necessary to recover a 12.75 percent return on APS, based on present and projected demand levels. The differences in rates set from that premise provide, from a different perspective, confirmation of the extent to which the APS service presently burdens other AT&T ratepayers.

No. 148, a comprehensive rate comparability study could not be prepared. While the carrier's reply provided a rate comparability study, we still cannot determine from the record how investment in packet switches was derived, or whether the switches employed for APS and AT&T's internal communications are used only for those functions. Total expenses, which exceed transmission line investment for the first six months, are not subdivided into switching and transmission categories. Second, while the benefits from AT&T's reliance on APS for internal communications needs are not seriously disputed,[34] questions remain concerning whether the underlying relationship between APS investment and usage is consistent for internal and external uses—i.e., if a consistent methodology has been applied to each facet of APS.[35] Further, even assuming that the allocation of investment between external and internal uses of APS reasonably reflects the functional capability allocated during operations, the signifi-

	Current Rates	*1984*	*1985*	*1986*	*1987*
Ports					
56	$1,065	$14,380	$6,070	$1,288	$789
9.6	615	8,302	3,505	744	461
4.8	470	6,345	2,679	568	352
Kilopackets					
0–4,000	$0.82	$11.07	$4.67	$0.99	$0.61
4,001–8,000	$0.77	$10.39	$4.38	$0.93	$0.57
8001–12,000	$0.72	$9.72	$4.10	$0.87	$0.54
12,000+	$0.67	$9.04	$3.81	$0.81	$0.50
Night	$0.34	$4.59	$1.93	$0.41	$0.25
Call Set-Up	$.0034	$.0459	$.0194	$.0044	$.0025

[34] Telenet, for example, acknowledges the use of packet service for internal communications is common and unavoidable. Telenet comments at 26 n.13.

[35] AT&T explains that the allocation of shared and dedicated facility investment between internal and external uses is grounded in "appropriate traffic measurements," specifically busy hour kilopackets (for switching investment), projected port allocations (for multiplexers and other port investment), and busy hour kilopackets and deployment plans (for facility investment). (Reply at 22-25) From this explanation, the use of busy hour kilopackets appears to be a reasonable allocator of switching investment. AT&T, however, has failed to provide any comparison of busy hour kilopackets on switches or ports allocated to internal and external uses, or even to clearly define the basis of their busy hour selection. Similarly, allocating investment to multiplexers and other port investment on the basis of projected port demand projections by customers and AT&T raises the issue of the underlying reasonableness of projections, a pervasive concern in this proceeding. Where facility investment is concerned, the use of deployment plans that appear to have internal inconsistencies (fn. 46) would alone be grounds for concern. Absent a better explanation of the procedures by which investment and expenses are derived, the allocation of APS facilities to internal AT&T uses is not satisfactorily justified.

cant scale of internal operations projected by AT&T-C raises a further question — the volume discounts applied in pricing APS usage elements. In light of the prospect that internal AT&T communications combined with AT&T-IS may dominate packet switch utilization for some time, these discounts should be explained in more detail in any subsequent proposals that employ a bundled structure with volume discounts. The general industry practice of discounting packet services with increasing usage does not warrant AT&T-C's adoption of such pricing for the primary benefit of AT&T entities without a reasonable explanation of the basis for the discount.[36]

22. Finally, if the moderated demand assumptions of para. 19 and the tariff-based pricing of transmission channels are combined, the indicated earnings performance of APS suggests much less optimistic prospects — prospects better aligned with those faced by competitors who presently own packet switches, and seek to configure service networks based on tariffed rates:

Chart IV. Results with Moderated Demand and Tariff-Based Pricing[37]

(Millions of Dollars)

	Revised Revenues	*Expenses (Tariff)*	*Net Op. Income*	*Taxes*	*Net Income*	*Cumulative Loss*
1985	3.3	17.519	(14.219)	(6.186)	(7.533)	7.533
1986	12.650	30.995	(18.345)	(8.439)	(9.906)	17.439
1987	30.300	47.158	(16.858)	(7.755)	(9.103)	26.542

Such potential APS competitors, however, must contemplate this challenge without ratepayers as a source of subsidy. It is precisely this competitive imbalance between offerings by AT&T's formally separated subsidiary, supported by regulated service revenues, and competitors forced to compete while relying on an unequally priced offering of underlying basic services, that animated our original action in *Computer II* and the recent constraints placed on the BOCs' provision of channels at different rates.

[36] In permitting AT&T-IS to resell basic AT&T-C offerings, the Commission noted its commitment to assuring that AT&T-C offerings are unbundled and do not discriminate among groups of customers. In particular, "any private line volume discount offered by AT&T-C must be available on a nondiscriminatory, unbundled basis which is either cost justified or reasonably designed to meet competition and promote reasonable rates for all of AT&T-C's services." AT&T-IS Resale, *supra*, at para. 17, citing Private Line Rate Structures and Volume Discount Practices, 97 FCC 2d 923 (1984).

[37] The figures shown are based on the statutory tax rate of 46 percent, which also represents an approximate average of the 42 and 52 percent tax rates derived from AT&T-C's comparability studies for tariff-base pricing in 1987 and 1986, respectively. The AT&T tax rates for APS under embedded-cost pricing for the same period are 42 and five percent, respectively; the latter figure appears to be a typographic error.

23. We recognize that 1984 was an atypical year in which to establish any new service, and that the difficulties AT&T experienced in meeting private line orders as well as the general adjustment to divestiture may have affected the demand for APS. The carrier's references to a "chilling effect" such developments may have had on customer decisions, and the intrinsically limited appeal of a nationwide service before its core network is fully deployed, however, while they may explain the failure to meet estimated demand, do not assure us that more recent projections will be met. Nor, more fundamentally, do they persuade us that the public interest is well served by continuing a price structure that favors AT&T-IS at the expense of private line ratepayers generally.[38]

C. APS' Dominance by AT&T-IS

24. AT&T-C's consistent optimism in demand projections is particularly important in assessing the reasonableness of APS rates, because the putative justification of embedded cost pricing by demand estimates has so far enabled AT&T-IS to obtain the underlying transmission components used in APS at preferential rates. Absent justification, however, this pricing practice constitutes the type of unreasonable rate discrimination barred by Section 202(a) of the Act, 47 U.S.C. § 202(a) and by antitrust doctrine.[39] See paras. 31-32 *infra*. The discrimination and price squeeze arguments are not strictly dependent on AT&T-IS' share of APS usage: were AT&T-IS a comparatively small contributor to overall use, the embedded-cost based rates would be potentially available to a wider body of customers, but they would still burden other AT&T ratepayers unjustifiably.

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[38] Projecting expected 1987 revenues at several successive levels below AT&T's estimate clarifies the effect on APS' return of tariff-based pricing of transmission channels. In the figures below, projected revenues are reduced by AT&T's calculation of expenses based on tariffed rates (Reply at Appendix G, page 3), and taxes are estimated at 40 percent of net earnings.

Projected Revenues	*Expenses (Tariff Rates)*	*Net Earnings*	*Return*
47.158M	47.158M	-0-	-0-
50.600M	47.158M	2.065M	6.84%
52.000M	47.158M	2.905M	9.7%
53.000M	47.158M	3.505M	11.60%
54.000M	47.158M	4.105M	13.60%
60.600M (AT&T)	47.158M	7.836M	25.944%

[39] The *Protocol Waiver Order* points out, at para. 5, that BOC proposals to commingle actual cost savings realized in the central office function with generic transmission channels, resulting in a "price squeeze" through separate pricing regimes for different channel purchasers, would conflict with United States v. Aluminum Co. of America, 148 F.2d 416, 430, 436-38 (2d Cir. 1945).

25. In fact, however, the prospects that AT&T-IS' share of APS usage will decline — apart from consideration of AT&T-C's own internal use — appear as speculative as those for overall APS demand. The installation of the core network may enhance the service's appeal, as AT&T suggests, but other circumstances may work against the displacement of AT&T-IS' role by other users, at least in the absence of artificial rate incentives. AT&T-IS confronts a competitive market for established service, with numerous competitors as noted by AT&T in Transmittal No. 59.[40] As noted, MCI has recently announced its intention to join their ranks in providing packet service. Apart from other packet service carriers, large users have clear incentives to consider constructing their own packet-based networks, obtaining only common carriage transmission from other entities, or constructing those facilities as well. The constraints on use of an unconverted packet service by smaller customers with asynchronous terminals are discussed in detail in the *Protocol Waiver Order*; reliance on this component of potential demand seems uncertain. We are thus unpersuaded that AT&T-IS is likely to be displaced, or its position as the dominant customer for APS substantially moderated, whatever the level of aggregate demand for APS service.

26. It thus appears that, even if AT&T's forecasts are realized, other AT&T ratepayers will have been burdened with the cost of sustaining a service that need not be offered as a regulated basic offering, but could instead have been provided by AT&T-IS and the burdens of revenue shortfalls allocated to shareholders. The failure of any element in the uncertain predictions for APS would entail a failure to recoup those burdens from APS users, primarily AT&T-IS.

27. There appears to be no justification for continuing to allow AT&T-IS to offer packet services, however structured, on the basis of a preferential rate for underlying basic transmission. The APS service is primarily useful to competitors if they do not own packet switching equipment, but as AT&T-IS is no longer under any restrictions respecting the resale of the underlying basic service, there is no requirement that a basic service offering be so bundled. The underlying rates afforded AT&T-IS appear unlikely to generate revenues sufficient to recover costs comparable to those sustained by a competitor employing unbundled AT&T-C transmission facilities, and AT&T-IS's share of APS usage confirms Commission misgivings that this offering would represent a

[40] In Tr. 59, AT&T listed GTE (GTE Telenet), Tymshare (TYMNET), United Telephone (Uninet), Automatic Data Processing (Autonet), H & R Block (Compuserve Network Services), Graphic Scanning (Graphnet), ITT (ITT FaxPak), and IBM (IBM Information Network).

specialized one for the benefit of the subsidiary.[41] More fundamentally, even were APS usage distributed more broadly to non-AT&T-IS entities, we would remain concerned that AT&T-C ratepayers generally, rather than shareholders, are burdened with supporting a preferential pricing structure.

D. The Protocol Waiver Order

28. We emphasize that introduction of a service at rates that initially fail to recover costs is not our primary concern in this context. It appears, for example, that MCI's recently announced packet service may underprice APS even under its current pricing regime, and we do not wish to restrict artificially AT&T's competitive responsiveness. We recognize that, because of start-up costs, earnings on any new service may initially fall below the level necessary to establish a positive rate of return, or even to cover costs. Rather, the issue is the proper allocation of the revenue shortfall. The decision to provide basic packet service at bundled rates that fail to comport with tariffed rates for separately available functional components raises the same fundamental concerns of fairness to other ratepayers and competitors that underlie the separate subsidiary requirement. These concerns, as commenters state, were recently addressed in the *Protocol Waiver Order*.

29. In that proceeding, several BOCs sought permission to provide the protocol conversion function at their central offices in order to offer a more efficient conversion between the asynchronous (ASCII/RS-232) terminals and the X.25 standard employed on packet networks. While the Commission declined to permit the BOCs to price interoffice transmission channels on the basis of embedded cost and bundle them with the central office conversion function,[42] it did recognize the potential efficiencies of

[41] AT&T asserts that the rates accorded AT&T-IS are generally available, and so far as this represents a viable option for competitors, this is true. However, the bundled, embedded-cost rates are useful only to competitors who either lack packet switching (and conversion) capability, and wish to offer a resold basic packet service without protocol conversion, or who are prepared to separately provide their own protocol conversion capability (perhaps prematurely writing off investment in existing packet switches) in order to take advantage of bundled AT&T-C rates, as AT&T-IS does. The latter prospect, while mitigating AT&T-IS' dominant role, would represent competitive entry founded on distorted market signals — services improperly priced and supported by other AT&T ratepayers.

[42] Apart from the conflict with *Computer II* rules, such arrangements represent improper discrimination under Section 202(a) of the Act, 47 U.S.C. §202(a). Enhanced service vendors and their customers would be disadvantaged by paying a substantially different price than the BOC customers for identical transmission channels. As a separate concern, if the BOCs' rates were set too low, BOC users of the data transmission services involving protocol conversion could be preferentially treated by the shift of transmission costs to other BOC ratepayers. Similar concerns, of course, arise with APS.

establishing, subject to appropriate constraints, a central office-based protocol conversion option for users who presently own customer premises equipment employing the more common ASCII/RS-232 protocol.

30. As noted, the existing packet services offered by AT&T's competitors provide protocol conversion as part of the network service. This occasions charges for transmission channels to a packet switch for protocol conversion which in some cases might be avoided or moderated by the central office conversion proposed by BOCs. In any case, while AT&T-IS is free to perform the enhanced protocol conversion function, AT&T-C is precluded from providing it by the same provision of our Rules from which the BOCs sought relief. As a result, the APS offering here under review is a purely X.25-based transmission offering.

31. AT&T-C replies to the petitioners' invocation of the *Protocol Waiver Order* by stating that the Commission merely applied its previously adopted guideline that protocol conversion capabilities not constrain the independent availability of basic facilities. As AT&T sees it, the continued availability of basic transmission offerings through AT&T-C and the projected 1987 returns for APS in excess of 12.75 percent satisfy the concern "which underlies the decision in the BOCs' Protocol Waiver Order." This represents a fundamental misunderstanding of that Order that must be corrected.

32. The concerns underlying the *Protocol Waiver Order* involved the prospect that the BOCs' provision of the conversion function as part of the proposed bundled offering would have combined the conceded efficiencies of providing that function at BOC central offices with preferentially priced interoffice channels — based, as in AT&T's present APS offering, on embedded cost. Thus, by providing protocol conversion bundled with transmission obtained at preferential rates, the BOCs' approach posed the risk that competition in the development of alternative solutions to the underlying problem of providing conversion would have been impeded by the artificially depressed rates charged for the BOCs' offering. This deficiency in the proposal was clearly not resolved by the continued offering of the unbundled transmission capability: the Commission explicitly stated its concern that the proposed combination offering of conversion and transmission channels would have priced the latter service component in a manner that violated Section 202(a) of the Act, 47 U.S.C. § 202(a), and traditional antitrust prohibitions. See fn. 39, *supra*. Nor would a demonstration that the bundled offering covered costs have resolved the

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The proposed arrangements to wholesale BOC interoffice channels to competing enhanced service providers at rates substantially higher than the costs used by the BOCs to price their own alternative services also would represent "a classic version of the price squeeze" condemned under the antitrust laws, some of which the Commission is empowered to enforce directly. *Protocol Conversion Order*, para. 7.

discrimination inherent in a rate which, even if it recovered costs, still would have conferred a rate preference on the BOCs' offering compared to potential competitors' packaging of comparable solutions. In fact, if one substitutes the packet switching function provided at an AT&T office for the protocol conversion function provided at the BOC office, the parallel with APS' common user structure is striking.[43]

V. Conclusions

33. In light of this record, the continued provision of APS as a basic service on an embedded-cost basis using the present demand projections could impede the development of competitive service offerings by favoring AT&T-IS unjustifiably, as well as imposing discriminatory burdens on some ratepayers. In the nineteen months since June of 1983, BPSS II and APS combined have garnered less than $12,000 from non-AT&T sources. If AT&T desires to offer a packet service at discounted rates, as have other entrants, it should not rely on captive ratepayers to bear the burdens of initial operating losses if no reasonably justified projections of later cost recoupment are presented. Nor should it employ that resource to compete with entities that must obtain transmission facilities without such support. The prospect that eventual demand increases will recoup the interim revenue foregone by discounted rates is too speculative to support preferential pricing that has so far largely benefitted AT&T-IS at the expense of other AT&T ratepayers.

34. We have therefore determined that the provision of packet-switched service as presently structured, based on rates for transmission

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[43] In granting the BOC protocol conversion waivers, the Commission required that investment and expenses associated with protocol conversion provided in the central office be removed from regulatory accounts so that even subsequent "stranding" of these capabilities would not affect rates for basic service. In the present context, the requirement that packet services priced inconsistently with underlying transmission offerings be provided through AT&T-IS, or that a tariffed basic packet offering by AT&T-C employ accounts isolated from accounts for regulated services generally, will have the same effect.

There is one respect, however, in which the factual context of the protocol conversion waiver requests and APS differ significantly. Where the BOCs proposed an offering dependent on the collocation of protocol conversion equipment in the central office, a configuration that currently precludes competitive entry, AT&T's packet service is offered in an environment well populated with established competitors. Thus, while the BOCs' proposal inherently presents the risk of a "price squeeze" by the service provider, the ACCUNET service to date has not conferred such market power on AT&T. Our discussion of the "price squeeze" analysis respecting APS therefore explains the problematic nature of the present APS rate structure's asymmetry, were the APS offering more successful; it does not determine at this juncture that the limited success of APS has established AT&T's market power as sufficient to constitute a "price squeeze" in this instance.

channels that operate to discriminate against competitors and burden other AT&T ratepayers, constitutes unreasonably discriminatory pricing under Section 202(a) of the Act, 47 U.S.C. § 202(a). This determination requires the withdrawal of the present APS offering.

35. Withdrawal of APS as now structured from AT&T-C's tariffs will serve the public interest in a more freely competitive marketplace, and need not restrict the packet services available from AT&T. Our purpose in taking this action is limited to assuring that AT&T's offerings, while reflecting any demonstrated efficiencies, do not attempt to establish an artificial pricing advantage unsupported by such efficiencies. AT&T's competitors routinely confront the marketplace economics of obtaining transmission channels to link their switches; to the extent this separate acquisition of components entails costs, such competitors incur them as a cost of doing business. To the extent, however, that AT&T's provision of a basic service (whether a packet offering or unbundled transmission) realizes economies, those economies should not be made available to particular customer groups on a discriminatory basis. In the broader context, we do not seek an AT&T-C structure that artificially supports "common user" offerings that might not yet be economic (*e.g.*, because not providing protocol conversion), or that could be more effectively replaced by other approaches.

36. AT&T-C is free to tariff a restructured common user offering, provided the tariff does not involve preferential pricing of transmission components. AT&T-C is also free to continue the internal use of packet switching technology to realize efficiency gains and develop economies of scale in the deployment of packet switching technology. AT&T-IS, for its part, also remains free to resell a restructured basic packet offering, or combine it with protocol conversion as an enhanced offering, at rates that do not initially recover underlying costs.[44] Thus, determination of the APS structure's unlawfulness in no way restricts AT&T's ability to compete in the packet services market. It simply precludes the burdening of subscribers to other, regulated AT&T services to support such an offering.[45]

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[44] Under the *Second Computer Inquiry*, ATTIS' offerings embracing the provision of basic common carrier services are subject to regulation under Title II of the Communications Act. AT&T-IS is thus required to (i) supply its [resold] basic services at just, reasonable and nondiscriminatory rates, 47 U.S.C. §§ 201-202; (ii) provide reasonable and nondiscriminatory interconnections to its basic services for CPE and enhanced services supplied by other vendors; and (iii) comply with the Second Computer Inquiry's unbundling requirements.

[45] AT&T states that the true test of the APS network will be market reaction when the "core network" of 28 switches is installed by the end of 1985. It seems probable that demand has been constrained by the limited physical scope of the APS service, but the physical limitations of the service provide no justification for deferring the requirement,

37. To minimize the disruption of AT&T-C's arrangements with customers, we will delay the requirement that APS be withdrawn for 120 days from the release of this Order, so that AT&T-C can propose a replacement APS offering. During this period AT&T will be subject to an accounting order to assure that revenue shortfalls will not be attributed to subscribers of other private line services. AT&T-C may revert to the previous unbundled BPSS structure, in effect prior to August 18, 1984, as an interim measure if it wishes. Any replacement filing should either unbundle switching from transmission components, or supply detailed rate comparability information from the outset, in order to establish that the replacement offering will price these components consistently with the carrier's tariffed rates for the counterpart component offerings.[46] Our determination that AT&T-C may not continue to offer APS under the present bundled discount structure does not preclude it from offering a bundled basic service, if the ratemaking practices employed establish genuine rate comparability to underlying components. Nor does it constrain AT&T-IS in any way in the offering of bundled or unbundled packet services, as such offerings' operating losses, if any, will not be borne by AT&T ratepayers subscribing to regulated offerings.[47]

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already long delayed, that AT&T-IS forego preferential rate treatment predicated on other AT&T ratepayers supporting sub-tariff pricing of transmission channels.

[46] In particular, we are concerned that the deployment of switches, multiplexers and concentrators be reconciled with the decision to designate particular AT&T offices as "APS" service points. The response to the Commission's request for information on facility deployment exhibited curious inconsistencies. For example, AT&T's 1985 data showed fewer APS switches (and multiplexers) than APS offices. This raises the prospect that transmission to an APS network switch, though functionally indistinguishable from private line transmission, may be repriced through the interposition of a designated APS office — in effect, establishing pricing points not correlated with any underlying APS functionality. While APS is not provided wholly under the structure adopted in Tariff Nos. 9, 10 and 11, and so is not required to align perfectly with that structure, it utilizes transmission channels that are separately available under those tariffs. A rate comparison of those channels with a subsequent APS structure should not be compromised by misalignment of designated offices and the equipment necessary to provide the service. If such differences between the pricing and provisioning of APS components are proposed, AT&T should justify them. AT&T should also indicate in future proposals any packet switching locations that are employed solely for internal use and are not listed in Section 5 of Tariff F.C.C. No. 10. AT&T should also state what functions are provided at such locations for internal use of APS (e.g., switching, multiplexing, concentration).

[47] Because AT&T's private line ratepayers in general will be isolated from the burdens of supporting the existing APS structure, and the revenues involved are comparatively small, we consider that allowing AT&T a substantial period in which to reform its APS structure will conduce to minimizing interruption of its marketing and facility deployment efforts.

VI. Ordering Clauses

38. Accordingly, IT IS ORDERED that pursuant to Section 202(a) of Communications Act, 47 U.S.C. §202(a), the Accunet Packet Service offering of AT&T Communications, Inc. investigated in CC Docket No. 84-906 IS UNLAWFUL.

39. IT IS FURTHER ORDERED, that those sections of AT&T Communications' Tariff F.C.C. No. 4 providing Accunet Packet Service BE WITHDRAWN within 120 days of the release date of this Order.

40. IT IS FURTHER ORDERED, that an accounting order IS IMPOSED on AT&T Communications. AT&T Communications shall separately account for revenues, costs, investment and net earnings associated with Accunet Packet Service until its withdrawal. Furthermore, AT&T shall charge any excess of costs (including its authorized rate of return) above revenues received to account 323.

41. IT IS FURTHER ORDERED, that the petitions submitted by GTE Telenet Communications Corporation, UNINET, Inc., Tymnet, Inc., MCI Telecommunications Corporation and International Business Machines Corporation, seeking reconsideration of the September 19 Commission Order allowing tariff revisions offerings ACCUNET Packet Service to take effect, and initiating this investigation, ARE DISMISSED AS MOOT.[48]

42. IT IS FURTHER ORDERED, that the investigation in CC Docket No. 84-906 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[48] We do not, however, contemplate that replacement of the present structure will be indefinitely delayed.

Diversification
Ownership and Management, Integration of
Site Availability

Review Board reversed ALJ's grant to applicant found to be best on comparative criteria, and disqualified applicant for lacking a transmitter site. The sole 100% full-time integrated applicant without any media interests was winner on standard comparative issue.
—*Cannon Communications Corporation*
MM Docket No. 83-976

FCC 85R-59

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Cannon Communications Corporation Chatham, Massachusetts	MM Docket No. 83-976 File No. BPH-811102AH
Cape Radio, Inc. Chatham, Massachusetts	MM Docket No. 83-977 File No. BPH-811120AQ
Spinnaker Communications, Inc. Chatham, Massachusetts	MM Docket No. 83-978 File No. BPH-811210AH
HBZ Communications, Inc. Chatham, Massachusetts	MM Docket No. 83-979 File No. BPH-820504AR
Dark Communications, Inc. Chatham, Massachusetts	MM Docket No. 83-981 File No. BPH-820623AK

Joseph A. Ryan Chatham, Massachusetts	MM Docket No. 83-982 File No. 820624AX
Heather H. Stengel Chatham, Massachusetts	MM Docket No. 83-983 File No. BPH-820624AZ
Chatham Broadcasting Company Chatham, Massachusetts	MM Docket No. 83-984 File No. BPH-820624BV
For a Construction Permit For a New FM Station	

Appearances

Tom W. Davidson and *Mark D. Schneider* on behalf of Cannon Communications Corporation; *David L. Hill* and *Audrey P. Rasmussen*, on behalf of Spinnaker Communications, Inc.; *Merilyn M. Strailman* on behalf of HBZ Communications, Inc.; *Donald E. Martin* on behalf of Dark Communications, Inc.; *Eric S. Kravetz* and *Donald E. Ward* on behalf of Joseph A. Ryan; and *Michael L. Glaser* and *Francis E. Fletcher, Jr.* on behalf of Heather H. Stengel.

DECISION

Adopted: July 23, 1985; Released: July 30, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Cannon Communications Corporation (Cannon), Cape Radio, Inc. (Cape Radio), Spinnaker Communications, Inc. (Spinnaker), HBZ Communications, Inc. (HBZ), Dark Communications, Inc. (Dark), Joseph A. Ryan (Ryan), Heather H. Stengel (Stengel) and Chatham Broadcasting Company (CBC) for authority to construct a new Commercial FM station on Channel 298B at Chatham, Massachusetts.[1] By *Hearing Designation Order*, 48 Fed. Reg. 45462, published October 5, 1983, these applications

[1] The application of Quinn Communications, Inc. was also designated for hearing, but was dismissed in the *Initial Decision* herein at the parties' request. *See* Tr. 376.

were designated for consolidated hearing on various issues, which, except for the standard comparative issue, were resolved by *Summary Decision*.[2] In an *Initial Decision* (*I.D.*) released November 13, 1984 (FCC 84D-78), Presiding Administrative Law Judge (ALJ) Joseph Stirmer granted Stengel's application noting, however, that her application was "preferred by the very slightest of margins in what is perceived as a close case among Cannon, Ryan and Stengel." *I.D.*, para. 117.

2. The proceeding is now before the Review Board on exceptions filed on December 27, 1984 by all of the losing applicants, except Cape Radio and CBC. Because Cape Radio and CBC did not file exceptions to the *I.D.*, their respective applications will be dismissed with prejudice for failure to prosecute, pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR 1.276(f). The Board also has before it a petition to reopen the record and enlarge issues against Stengel filed February 14, 1985, by Cannon, in which Cannon seeks addition of issues to determine whether Stengel's (then) proposed transmitter site is available and suitable for an FM transmitter site, as well as whether Stengel misrepresented to the Commission that it had "reasonable assurance" that its (then) proposed transmitter site would be available. The Board has reviewed the *I.D.* in light of the exceptions and reply briefs, the petition to reopen the record and enlarge issues and responsive briefs, the oral arguments of the parties held before the Board on April 19, 1985, and our own examination of the record. The ALJ's findings of fact are adopted, except as modified in this *Decision*; but in light of our holding that Stengel is disqualified for lack of a transmitter site, *see infra.* para. 3 *et seq.* we reverse the *I.D.*'s ultimate conclusion that Stengel is the comparative winner, and we conclude that a grant of Ryan's application would best serve the public interest, convenience, and necessity.

Basic Qualifications

3. *Stengel.* From the outset, the Stengel claim to "reasonable assurance" of a transmitter site has been marked by confusion, then neglect, more confusion, dissimulation, argumentation, until — finally (but predictably) — a pending post-hearing, post-oral argument request to amend its application to specify an entirely new transmitter site.[3] This chain of

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[2] *See* paragraph 4 of the *Initial Decision* for a detailed recitation of the *Orders* resolving the designated issues. One further issue involving whether Cape Radio properly maintained its public inspection file and added by the presiding Administrative Law Judge (*see Memorandum Opinion and Order*, FCC 84M-297 released January 19, 1984) was tried at hearing, but is not pertinent here.

[3] The Commission does not expect applicants to guarantee, at the time of application, that they have a transmitter site from which to broadcast. The standard is "reasonable assurance" that the site specified in the application will be available to the specifying applicant at the time of construction. (*See infra* para. 4).

events is not materially different than that carried by another recent applicant disqualified for, *inter alia*, legal lack of a transmitter site, *see Dutchess Communications Corp.*, 58 RR 2d 381 (Rev. Bd. 1985), and the identical result will follow for Stengel. We hereinbelow set forth the chain of events dictating this result.

4. Stengel's lack of "reasonable assurance" to a transmitter site was revealed early on in this proceeding. Whither its originally purported site ("Stengel I"), Stengel amended its application for the first time on October 22, 1982 to specify a second site ("Stengel II") actually owned by the Town of Orleans, which entity had never been contacted about the site.[4] As it turns out, though, Stengel pleads mistake when claiming Stengel II as its *intended* site; it later asserted that it actually sought to specify a "plot owned by the same person but located across the road from the present amended site." Stengel Petition for Leave to Amend (filed February 1, 1983).[5] Putting aside, for the nonce, Stengel's erroneous (but quite telling) misassumption as to the ownership of Stengel II, it nonetheless asserted (until recently) that it could properly claim "reasonable assurance" of that site based upon an October 1982 telephone call from Heather Stengel in Denver, Colorado to Joseph W. Sherman, Sr. "whom [she] understood was the owner of the site . . . ." Stengel Opposition to Petition to Reopen (filed March 8, 1985), Affidavit of Heather Stengel (Attachment A) at 1. According to Stengel, the two telephonically "agreed to discuss the matter further during [Heather] Stengel's planned visit to the Cape Cod area during the forthcoming Christmas holidays." Stengel Opposition at Petition to Reopen at 4. However:

> Stengel was unable to return to Cape Cod for the holidays as planned and she therefore wrote Sherman a letter on January 4, 1983 confirming their Fall 1982 telephone conversation during which, the letter states, ' . . . you indicated that you would likewise be interested in leasing this land to me.' (Stengel Affidavit, Attachment A, Exhibit 1). Thus, Stengel confirmed the availability of her site in writing.

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[4] *See* Cannon Petition To Reopen at 5.

[5] Again, as it turns out, this assertion is factually incorrect: the site across the road was not owned by the "same person" as Stengel II, but by another party, the Ethel W. Sherman Trusts. Cannon Petition To Reopen at 6. Stengel's confusion as to the ownership of Stengel II, innocent or not, is a revealing indication of its lackaday as to its transmitter site, and it certainly helps erode any notion as to its "reasonable assurance" to the site specified. It seems elementary that an applicant, at a minimum, should know exactly who owns the site specified and precisely where it is located before it can claim reasonable assurance. It would seem insufficient that Stengel generally believed that the land sought for the site was a parcel "located near the junction of Routes 28 and 39." Stengel Opposition to Petition to Reopen at 7.

Id., at 4-5.[6] The record thus reflects that (even if Stengel had not been discussing land *actually* owned by the Town of Orleans and even had Joseph W. Sherman, Sr. had the authority to lease the Trust land) absolutely no lease or lease terms had been negotiated for the purported site; negotiations, if any, were to come during the 1982 "Christmas visit" from Denver, a visit cancelled by Heather Stengel. As can be clearly seen, Stengel had little basis — at that point — for claiming "reasonable assurance" to the Stengel II site. For it has been long held that "a mere possibility that the site will be available will not suffice," *William F. and Anne K. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974), even where an owner indicates that "he could foresee 'no problem' " in locating a radio tower on the land. *Id*; *see also El Camino Broadcasting Corp.*, 12 FCC 2d 25, 26 (Rev. Bd. 1968) (issues added where site owner merely "indicated a willingness to discuss a lease agreement"). The Board has recently reiterated these principles at great length. *See South Florida Broadcasting Co. Inc.*, 99 FCC 2d 840 (Rev. Bd. 1984).[7]

5. But Stengel's tale does not end there: In answer to Stengel's self-confirmatory letter of January 4, 1983, Joseph W. Sherman, Sr.:

> responded by return letter in which he acknowledged their prior discussion and correspondence and advised Stengel that 'the specific land at the junction of Routes 28 and 39 is not zoned for business.' He noted that the property had been rezoned residential a few years ago and that 'at the time of our conversation I forgot to mention this fact.' His letter goes on to mention that he owns another piece of 'available land' which is zoned for business located across from his house in South Orleans. (Stengel Affidavit, Attachment A, Exhibit 2).

Stengel Opposition to Petition to Reopen at 5.[8] Despite Mr. Sherman's

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[6] An applicant cannot unilaterally "confirm" the availability of its site; such confirmation must come from the party who controls the land. *Valley FM Radio*, 57 RR 2d 420, 421 (Rev. Bd. 1984) (applicant's "self-serving letter" does not provide reasonable assurance of site where party having dominion over site raises doubts). In fact, Stengel's letter of January 4, 1983 merely indicated that "I am very interested in *possibly* leasing this land for a commercial purpose." *Id.*, at Attachment A, Exhibit 1 (emphasis added).

[7] It is conceded by Stengel that no lease terms whatever had been settled upon between it and Sherman. Tr. of Oral Arg., April 19, 1985, at 1077-1081. The record not reflecting that Stengel had discussed the cost of the purported site, we question whether or how Stengel could continue to represent its financial qualifications. Were it not otherwise disqualified, any remand hearing would contain an appropriate financial issue against Stengel based upon this significant factual uncertainty.

[8] Cannon's Petition to Reopen contains the following affidavit:

> I, Joseph W. Sherman, Jr. of Johnston, Rhode Island, on oath depose and say:
>
> 1. I am a Trustee of the Ethel W. Sherman Trust, the owner of the lots in South Orleans designated as No. 2164 and 2163 on the attached portion of the Orleans Assessor's Maps.
>
> 2. The Trust was contacted by Heather Stengel, or a representative of said Heather Stengel, regarding the use of Lot No. 2163 for a radio station.

January 17, 1983 letter, Stengel continued to specify Stengel II, or at least until February 1, 1983 when it discovered — lo and behold — that Stengel II was not even situated on land owned by the Sherman Trust; on that February date, and disregarding the plain import of the January 17, 1983 letter from Sherman, Stengel again amended to represent that it had "reasonable assurance" to a Sherman Trust site (this time, Stengel III).[9] The record, of course, reveals absolutely no negotiation for (or agreement with) the Sherman Trust regarding Sherman III. Thus, to the extent that Stengel's February 1, 1983 application amendment indicated "reasonable assurance" of Stengel III, it lacked considerable candor.[10]

6. With no assurance whatever of Stengel III ("reasonable" or otherwise), no dissection of the entrails will be necessary to conjure the resultant scenario, a *tableau vivant* notably mundane.[11] Following the

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3. She was informed that Lot No. 2163 was not available for that use, and would never be available for that use, because it was zoned for residential land.

4. The Trust also owns Lot No. 2164 and the Trust has never been contacted by Heather Stengel or any other person requesting permission to place a radio tower on the said Lot No. 2164.

5. If asked, the Trust would have refused to make Lot No. 2164 available for use as the site of a transmitter tower and it is the intention of the Trust that Lot No. 2164 will never be used as the site of a transmitter tower.

Id., at Attachment 8. Cannon has also "submitted identical affidavits from all of the [Sherman] trustees averring that 'the trust' was contacted by Stengel and 'the trust' told her that the land 'was not available and never would be available.' " Stengel Opposition to Petition to Reopen at 6 n. 5. Stengel argues — again with telling evidence of her thoroughgoing ignorance surrounding the Sherman Trust site(s) — that "Stengel had no knowledge of a trust and never communicated with the persons Cannon identifies as trustees except for Mr. Sherman, Sr." *Id.*

[9] In fact, Stengel III might not have belonged to the Sherman Trust either; incredible as it sounds, it seems to be claimed that the site specified in the February 1, 1983 "is located within the parcel of land owned by Andrew J. O'Brien, Jr.," whom "no one ever approached . . . about the use of the parcel as a site for a radio tower . . . ." Cannon Petition to Reopen at 4. For reasons which follow, we need not decide whether this Cannon claim is accurate.

[10] We do not, by this conclusion, necessarily find that lack of candor to be disqualifying within the Commission's lexicon. *See e.g., Fox River Broadcasting Inc.*, 88 FCC 2d 1132, 1136-1138 (Rev. Bd. 1982); *Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 398-402 (Rev. Bd. 1984). It may have been careless, presumptuous or something else short of a malicious intent to deceive. *See e.g., Fox River Broadcasting, Inc., supra.* We recognize that no finding of actionable misrepresentation can precede an evidentiary hearing on this issue. *See West Coast Media* v. *FCC*, 695 F.2d 617, 620 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 74 (1983), a hearing negated here *solely* by our disqualification of Stengel on the basic site qualification matter. *See Dutchess Communications, supra*, 58 RR 2d at 390 n. 31.

[11] *See, e.g., Houston Family Television, Ltd.*, FCC 85R-56, released July 10, 1985; *Dutchess Communications, supra.*

April 19, 1985 oral argument before the Board, Stengel filed, on April 26, a petition seeking leave to *again* amend its application to specify yet another transmitter site (Stengel IV). As just reiterated in *Dutchess Communications, supra,* an applicant seeking to amend after the hearing process has commenced must demonstrate "good cause" in accordance with 47 CFR §73.3522(b).[12] Indeed, in the case of engineering amendments such as that tendered post-hearing by Stengel, an applicant must meet a somewhat stricter standard and demonstrate that the change reflected in "the amendment is necessitated by events that the applicant could not reasonably have foreseen (*e.g.*, notification of a new foreign station or loss of transmitter site by condemnation)." 47 CFR §73.3522(b)(1)(i); *Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *review denied* FCC 84-119, released April 2, 1984 (Comm'n) *aff'd mem. sub nom. Royce International Broadcasting Co.* v. *FCC*, No. 84. 1168 (D.C. Cir. filed April 30, 1985); *California Broadcasting Corp.*, 90 FCC 2d 800, 809 (1982); *Belo Broadcasting Corp.*, 68 FCC 2d 1313 (1978); *see also Houston Family Television, supra; Dutchess Communications, supra; Valley FM Radio*, 57 RR 2d 420 (Rev. Bd. 1984).

7. We recognize, of course (as did the court in *Royce International Broadcasting, supra*[13]), that the due diligence element of the "good cause" test for application amendments should be tempered by the particular equities of the case when an amendment is intended, as here, to cure a disqualifying defect *See, e.g., Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489 (1981). The Board does permit amendment where the equities so militate. *See, e.g., Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 402-405 (Rev. Bd. 1984); *Bison City TV 49 Limited Partnership*, 91 FCC 2d 26 (Rev. Bd. 1982). But the facts here bear no resemblance whatever to those in *Anax* or any other case accepting a late-qualifying amendment, and the equities here run from Stengel as water from a colander. To recapitulate, Stengel amended away from her originally specified site (Stengel I), and then erroneously specified a site (actually belonging to the Town of Orleans (Stengel II)) on the basis of a long-distance telephone call to a party not authorized to negotiate on behalf of the land Stengel claims it actually *intended* as Stengel II. However, it never seriously negotiated the acquisition of the *intended* Sherman Trust site, Heather Stengel having cancelled a prospective 1982 Christmas visit to Massachusetts to discuss the property. When thereaf-

[12] The six elements of the "good cause" test are set out in *Erwin O'Connor Broadcasting Co.*, 22 FCC 2d 140 (Rev. Bd. 1970), and are as follows:

> (1) due diligence; (2) involuntariness; (3) the lack of need for the modification or addition of new hearing issues or parties; (4) no disruption of hearing process; (5) no prejudice to other applicants; (6) no comparative 'upgrading.'

[13] *See* the court's *Memorandum* at 1.

ter advised by letter of zoning problems with the intended site, Stengel nonetheless reaffirmed its purported "reasonable assurance" of the site by amending to specify Stengel III, again without a scintilla of negotiation as to that site.[14] We cannot, therefore, find that Stengel's "after-the-ball-is-over" bid to now amend to Stengel IV is based upon any unforeseeable event. *Compare Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 799-801, (Rev. Bd. 1984) (local airport unexpectedly reneges on FAA site approval), *recon. denied*, 57 RR 2d 1363 (Rev. Bd. 1985); *California Broadcasting, supra* (site specified later legislated into national park). Much like the applicant in *Dutchess Communications, supra*, it is apparent that Stengel had little foreseeable use of a Sherman Trust site to begin with, let alone the "reasonable assurance" required by our legal standards. *South Florida Broadcasting, supra.* Its claim to the *intended* site was simply a product of fancy, folly, finesse, or flimflam, the selection depending on a reading of Heather Stengel's state of mind, about which we need not here inquire deeply. *See supra* note 10; *Dutchess Communications, supra.* As to equities, we realize that Heather Stengel was attempting to piece together her instant application while pursuing her legal training in Denver, Colorado. *See I.D.*, para. 70. But, her application might have achieved more validity had she devoted at least as much effort to truly securing a transmitter site and to familiarizing herself with the "Rule in Wallace's Case"[15] as she presumably did with respect to the

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[14] We need not here decide whether the zoning problem afflicting Stengel III robbed that applicant of the ability to claim "reasonable assurance" to that site. *Compare Gainesville Media, Inc.*, 59 FCC 2d 382, 385 (Rev. Bd. 1976) (issue based upon zoning inconsistency "not warranted absent a reasonable showing that the applicant will not be able to obtain prior authorization for its plans") *with Bay Broadcasting Inc.*, 24 RR 2d 1, 4 (1972) (reasonable assurance to site presumed where counsel determined "that a zoning variance can be obtained for the currently proposed transmitter site"). *But*, despite her undisputed knowledge — at least by January 17, 1983 — of the zoning problem with the Sherman site(s), no such problem was ever reported to the Commission pursuant to 47 CFR §1.65. The Commission demands to be advised if there are zoning problems or other "matters relating to environmental effect." 47 CFR §1311(a)(3). Were a remand hearing on potential misrepresentation here ordered (*see supra* note 10), we would also add a reporting and/or a candor issue against Stengel for her failure to promptly advise that the land specified, just a few years prior thereto, had been rezoned from business to residential. Perforce, such an issue would explore just why the "*Environmental Statement*" submitted by Stengel in October, 1983 contained the following representation:

> There are no known zoning restrictions that would prohibit use of the proposed site for erection of the antenna system herein proposed.

Cannon Reply to Opposition at Attachment 1.

[15] *William F. and Anne K. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974). The circumstances surrounding Stengel's latest amendment, which we reject, may be contrasted with those obtaining to the applicant chastized, but not disqualified, in *Ithaca*

"Rule in Shelley's Case."[16] We have an abundance of other richly qualified applicants in this case who have prosecuted their applications in accordance with our application standards, and in the highest good faith. There are no legitimate grounds at all for accepting Stengel's April 1985 transmitter site amendment. *Houston Family Television, supra*; *Dutchess Communications, supra*; *Valley FM, Radio, supra*; *Shoblom Broadcasting, supra*; and, therefore, being legally bereft of a transmitter site, Stengel is conspicuously unqualified.

Comparative Qualifications

8. Our framework for reviewing exceptions directed to the proceeding's comparative aspects is, as always, the *Policy Statement on Comparative Broadcasting Hearings ("Policy Statement")*, 1 FCC 2d 393 (1965), as augmented and interpreted by the thousands of cases which have refined our standards in the succeeding twenty years. Thereunder, two main criteria - the only two decisionally relevant in this case - are referenced to help to preliminary rank the applicants: (1) "[d]iversification of control of the media of mass communications," the "factor of primary significance"[17]; and, (2) "[f]ulltime participation in station operation by owners," a "factor of substantial importance."[18] We have reviewed the ALJ's comparative reckoning, and we find most of it sound.[19] As to media diversification, the only exception that requires extended discussion is that lodged by Cannon,[20] which fires a noisy, 35-page broadside against the regnant law. Unfortunately, its trajectory is some distance over the heads of the ALJ and this Board.

TV Associates, FCC 85R-57, released July 16, 1985 (Rev. Bd.) at para. 7 *et seq.* Had *Ithaca TV* been a "comparative" case, a demerit might have cost that delinquent applicant the case.

[16] 1 Coke, 93b (23 Eliz. in C.B.)

[17] 1 FCC 2d at 394.

[18] *Id.*, at 395. Although some credit is awarded for less than fulltime ownership integration (*e.g.*, parttime (20 hrs. per week) and substantial time (30 hrs. per week)), the heavy emphasis is on fulltime integration, for - after that- "the credit given will drop sharply." *Id.* As to "comparative coverage," another important element in our relative differentiations, *see id.*, at 398-399, none of the applicants here are entitled to favor. *See* Spinnaker Exceptions at 1 (["b]y stipulation and joint exhibit, the parties have disclaimed any comparative advantage on the basis of areas and population").

[19] Obviously, however, our refusal to accept Stengel's post-hearing, post oral argument transmitter site amendment for lack of "good cause" alters his final result.

[20] We easily affirm the ALJ's determination that Ryan is to receive no diversification demerit because of Joseph Ryan Associates. *See, I.D.*, para. 93. Nothing in the business of Associates, *see id.*, at para. 64, warrants our concerns respecting *control* of the *media.*

Diversification of Control of the Mass Media

9. In the *I.D.*, the ALJ's analysis of the diversification of control of the mass media charged Cannon with several media interests held by the spouse of the sole proprietor of Cannon, Lynn L. Landy. *See I.D.*, paras. 87-91.[21] In attributing to Mrs. Landy the media interests of her husband, Richard Landy, the ALJ properly applied what has come to be known as the "spousal attribution" doctrine, by which the media interests of one spouse are considered the interests of both marital partners for purposes of promoting greater media diversification. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423, 425-427 (1981) (and cases cited therein).[22]

10. In *Klein*, the Commission accurately stated that there is a "clear community of interest" between marital parties, 86 FCC 2d at 426, and it declared that its spousal attribution doctrine was "supported by a reasonable non-invidious purpose - that of furthering diversification of ownership and control of the media." *Id.*, at 427 (footnote omitted).[23] The Board has uniformly applied the *Klein* doctrine. *See, e.g., Angeles Broadcasting Network*, 96 FCC 2d 5 (Rev. Bd. 1984), *review denied*, FCC 84-495, released November 26, 1984 (Comm'n), *recon. denied*, FCC 85-126, released March 19, 1985, *appeal pending sub nom. Maranatha Broadcasting, Co., Inc.* v. *FCC*, No. 84-1618 (D.C. Cir. 1984) (and companion cases).

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[21] Paragraph 14 of the *I.D.* states:

> Since 1981, Ms. Landy's husband, Richard Landy has been Chairman of the Board, Secretary/Treasurer and major shareholder of Saw Mill Broadcasters, Inc. (Saw Mill), licensee of Class IV AM Station WKNY, Kingston, New York, which operates at 1 kW day and 250 w night. Mr. Landy holds and/or subscribes to 63.9 percent of Saw Mill's stock. Kingston is 200 miles from Chatham, and is served locally by WGHO(AM), WBPM(FM), and a daily newspaper, *The Daily Freeman*. From 1980 to September 1983, Mr. Landy was also president and one-third shareholder of Oxford Communications, Inc., operator of a cable television system in Palm Beach County, Florida. Pursuant to her husband's request, Ms. Landy served as Director of Oxford Communications from March 1982 to August 1982, and received a 1.6% interest in the company as a gift from her husband. [Footnote and record citations omitted]

[22] *See generally Absolutely Great Radio, Inc.*, 95 FCC 2d 1023 (1983), *remanded sub nom. Ventura Broadcasting Co.* v. *FCC*, No. 83-2167 (D.C. Cir. filed June 18, 1985).

[23] Although the *Klein* Commission expressly rejected the argument that the spousal attribution doctrine was impermissibly discriminatory as to married parties, *see* 86 FCC 2d at 427, Cannon nonetheless has been essentially its entire case to the argument that *Klein* and the spousal attribution doctrine are unconstitutional as applied to its particular client. *See* Cannon Exceptions at 6-35. While we tentatively believe that Cannon's constitutional arguments are wholly without merit, *see, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978) ("reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed"); *Cutts* v. *Fowler*, 692 F.2d 138, 140-141 (D.C. Cir. 1982), we cannot rule definitively on that argument.

11. However, Cannon correctly observes that "[t]he Commission refused to incorporate its spousal attribution policy into its lottery rules to select from among competing applications [for low power TV]."[24] Furthermore, we note that in its reconsideration for its "attribution rules," the Commission has determined that marital partners employing a qualified limited partnership agreement may now proffer precisely that foreclosed by *Klein*, to wit: "a disclaimer of active interest or participation in a commonly owned entity . . . ." 86 FCC 2d at 426. Its recent reconsideration order declares[25]:

> With respect to the specific situation in which a marital relationship is involved, we have previously determined that the interests held by one spouse are to be presumptively attributed to the other. *Lady Sarah McKinney Smith*, 59 FCC 2d 398, 401 (1976); *Waters Broadcasting Corp.*, 88 FCC 2d 1218-19, *rev'd on other grounds*, 88 FCC 2d 1204, 1206 (1981), *set aside*, 91 FCC 2d 1260 (1982), *aff'd sub nom. West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, Case No. 84-7000 (March 4, 1985). Notwithstanding the nearly conclusive stature the Commission has accorded this presumption in the past, we will henceforth permit this presumption to be rebutted, on a case-by-case basis, in appropriate circumstances.

12. We concede the varying applications of the "spousal attribution" doctrine, but must conclude that - apart from the slim exceptions carved out in the two foregoing rulemaking proceedings - the Commission has purposely maintained the general validity of the *Klein* line of cases. Indeed, its recent reconsideration order expressly took cognizance of the general doctrine on "spousal attribution," etched a narrow exemption for those limited partnerships containing the requisite insulative provisions, and moved on.[26] There can be no doubt whatever that this careful and considered craftsmanship by the Commission signified on otherwise basic reaffirmation of *Klein*; had the Commission wished to abrogate the "spousal attribution" doctrine, it obviously would have said so. As we are bound by the Commission's stated doctrine, we must reject the Cannon volley. Mrs. Landy, for better or worse, is married to the media interests of her husband; and we, like the Commission, cannot accept that, barring extraordinary circumstances, married media owners would neither confer nor influence the other's operation of the not-too-distant radio stations in a manner that detracts from the optimum diversification of media voices encouraged by the *Policy Statement. See Klein, supra.*[27]

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[24] Cannon Exceptions at 19, *citing Second Report and Order, Use of Lottery Procedure*, 93 FCC 2d 952, 977-978 n. 36 (1983).

[25] *Reexamination of the Commission's Rules Regarding Attribution of Ownership Interests* (MM Dct. No. 83-46), FCC 85-252, released June 24, 1985, at para. 50 (footnote omitted).

[26] *See* FCC 85-252, *supra* note 25, at para. 50 & n. 70.

[27] If empirical evidence were needed to illustrate the ordinary "community of interest" between married couples with respect to media properties, we recall that Mrs. Landy served as a director of Oxford Communications, a cable television company owned and

Integration of Ownership With Management

13. The comparative *Policy Statement* places a premium on the integration of ownership with day-to-day working control over the station, *see* 1 FCC 2d at 395,[28] and those applicants proposing to integrate the highest percentage of *de jure* ownership into the "hands-on" management of the station, *ceteris paribus*, are given a strong comparative plus.[29] The ultimate integration "plus" goes to that applicant proposing a "clear quantitative difference" over its competitors.[30] For although the Commission also examines the personal, qualitative aspects of an integrated ownership's makeup:

> It is well established that qualitative attributes, such as minority ownership, may enhance the value of an integration proposal but cannot overcome clear quantitative differences. *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 428-29 (1981); *Van Buren Community Service Broadcasting, Inc.*, 87 FCC 2d 1018, 1022 (Rev. Bd. 1981).

Horne Industries, Inc., 98 FCC 2d 601, 604 n. 12 (1984).[31]

14. Disregarding the clarity of the Commission's prose and precedent, two remaining applicants with otherwise admirable credentials - HBZ and Spinnaker - argue that we should elevate their enhancing qualitative attributes over the quantitative integration differences.[32] The ALJ awarded HBZ an 80% fulltime integration factor, *I.D.*, para. 108, and Spinnaker a 66% fulltime factor. *I.d.*, para. 111. HBZ argues that "[t]he difference between its application and that of applicants proposing 100% should not be decisionally significant."[33] And, while not contesting the ALJ's award of only a 66% fulltime integration factor, Spinnaker submits that "[s]ince the touchstone of integration is legal control, any distinction

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run by her husband (*see supra* note 21). This little meteorite of fact pings audibly above Cannon's constitutional uproar.

[28] *See also Ventura Broadcasting Co.*, v. *FCC*, *supra*, slip op. at 2.

[29] *See generally id.*, at 6-7.

[30] The Board has found that a 12.5% difference in the quantum of fulltime ownership integration reflects such a "clear" quantitative differentiation. *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1981) (subsequent history omitted).

[31] The *Policy Statement* also directs consideration of other matters such as local residence, local civic activities, past broadcast experience, and - now - minority and female ownership. *See West Michigan Broadcasting Co.* v. *FCC*, 735 F. 2d 601 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1392 (1985).

[32] Dark's Exceptions urge that it be awarded an 80% fulltime integration factor rather than the 41% fulltime, 39% substantial time, and 20% parttime factor awarded by the ALJ. *See I.D.*, para. 109. We tend to agree with the ALJ's reasoned analysis, but need not decide this matter since it is, ultimately, non-decisional. That is, even if we cede Dark its disputed 80% integration factor, it cannot prevail under the integration criterion over an applicant proposing to integrate 100% of its ownership on a fulltime basis. *See, e.g., Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 649 (Rev. Bd. 1983) (76.3% fulltime plus 21.7% parttime comparatively inferior to 100% fulltime); *see also Horne Industries*, *supra*, 98 FCC 2d at 604 n. 12.

[33] HBZ Exceptions at 10.

between Spinnaker's 66% (full-time) and [other's] 100% integration, for example, is without rational basis."[34] We acknowledge also that the dominant emphasis on the quantitative integration factor has been criticized, particularly where an applicant is proposing to integrate that person (or persons) having effective voting control over the licensee in any event. We further recognize that the primary focus on the quantitative factor diminishes the relevance of the qualitative attributes, even though an applicant proposing, for example, 80% fulltime integration might have many more of the other of the meritorious qualities sought by the *Policy Statement*, such as long-time local residence extensive local civic activities, superior broadcast experience, or — now — favorable racial or sexual characteristics. And, finally, we concede that a primary focus on the quantitative factor provides a "leg-up" for the sole integrated proprietor over a multi-party applicant entity not proposing integration by all of its members, notwithstanding that the latter may bring more in terms of local residence and civic involvement as well as cultural diversity. This is surely food for thought.[35] And, yet, the law on this point is certainly not new; all of the applicants here (and certainly the experienced communications counsel representing all applicants) were keenly aware of the critical importance of the quantitative factor at the outset. They nevertheless took their chances, knowing that a competing applicant proposing to integrate fulltime the *entirety* of its active ownership would prevail under the *Policy Statement's* integration criterion. In any event, the precedent by which we are bound is plain, *see Horne Industries, supra*, and the various exceptions on this matter must be rejected.

Conclusions

15. In his final comparative analysis, the ALJ synopsized his view of the relative positions of the applicants: "Cannon is preferred over both Stengel and Ryan on qualitative integration, but has attributable media interests." *I.D.*, para. 116. Stengel being disqualified, we first address the other two applicants proposing 100% fulltime ownership integration.

[34] Spinnaker Exceptions at 6. Spinnaker also attacks the HBZ application as "essentially a situation where an unqualified and inexperienced minority person is a front for three attorneys, one of whom will 'call the shots'." *Id.*, at 8. Because both Spinnaker and HBZ are inferior to the applicants proposing 100% fulltime integration, we need not address this contention.

[35] The concern, if any, over the predominance of the quantitative integration factor is lessened considerably in this case, because the applicant herein granted the construction permit, Ryan, not only receives 100% fulltime integration credit, but also has outstanding qualitative attributes; *viz.*, local residence and "more than 50 years" of familiarity with the Cape Cod area, *I.D.*, para. 66, as well as exceptional broadcast and communications experience. *Id.*, paras. 60-63. The permit we here award will obviously repose in capable hands — hands which in Ryan's experience have been busy for a long time with public service broadcast activities. *See id.*, para. 62.

Although Cannon's female ownership is to be treated in a preferential manner over Ryan's maleness, *Horne Industries, supra*, it does not - as a weighting element - warrant a fraction of the importance of our "primary" comparative concern, diversification of the media. *See* 1 FCC 2d at 394.[36] Nonetheless, as a fallback argument, Cannon claims to be "superior to Ryan on the basis of female enhancement, past and proposed local residency, and participation in local civil activities.[37] On the other hand, the ALJ correctly synthesized Ryan: "solid past broadcast record; resident of service area for last ten years on a part-time basis, including nine months a year during past two years." *I.D.*, para. 113. We find Cannon and Ryan's integration proposals to be, therefore, essentially equal from a qualitative standpoint, with perhaps a slight edge to Cannon if the weight apparently accorded to Mrs. Landy's gender is as perceived by the ALJ. *See id.*, para. 116.[38] Under any circumstances, though, the dispositive lever in this contest is quite obviously the diversification demerit affecting Cannon. Even were we to categorize its demerit as "slight," Ryan - with no media interests whatever - must prevail. *See Colorado Television, Inc.*, 56 RR 2d 1080, 1089 (Rev. Bd. 1984); *Joseph Bahr*, 92 FCC 2d 114, 123 (Rev. Bd. 1982) (subsequent history omitted). Whereas the Florida CATV interests are here a *de minimus* consideration, *see Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 988 (1984); *I.D.*, para. 116, the ownership of Saw Mill Broadcasters, Inc. by the spouse of Cannon's sole proprietor places Cannon quite solidly behind Ryan.[39] As

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[36] The Commission recently clarified the relative weight to be given to racial and sexual preferences. In *Radio Jonesboro, Inc.*, 57 RR 2d 1564, 1567 (1985), it stated that "minority ownership and local residence have equal significance in choosing the comparative superior applicant." Female ownership is not as favored as minority ownership. *Horne Industries, supra*, 98 FCC 2d at 603; *Santee Cooper, supra*, 99 FCC 2d at 804-805. And local residence is merely one enhancing attribute under the much larger integration criterion, a criterion secondary to media diversification.

[37] Cannon Exceptions at 41. It further banks on its auxiliary power proposal. *See id.* We do not agree, however, that Cannon is superior on local residence; it and Ryan are entitled to approximately co-equal credit. *Compare I.D.*, para. 13 *with id.* para. 66.

[38] Ryan complains:

> Review of the comparative broadcast proceedings in which the Commission has awarded a female preference discloses none that has been judicially reviewed and approved on this point, and thus the Commission's discretion to award such a preference is not, at this point, judicially sanctioned.

Ryan Exceptions at 13-14 (footnote omitted). Although the Commission's sexual preference policy is under direct challenge in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir. 1984), a case which has been argued but not decided, we are bound - as we were on Cannon's "spousal attribution" exceptions - to apply Commission sexual preference policy as iterated in *Horne Industries, supra.*

[39] Indeed, as we review the comparative merits, we believe that other applicants such as HBZ and Spinnaker, *both without other media interests*, *I.D.*, paras. 89-94, would also

to the other qualified applicants without existing mass media interests, Ryan's 100% fulltime ownership integration proposal, duly enhanced by the indicated qualitative considerations, is - under strictly objective legal tenets - superior.

16. ACCORDINGLY, IT IS ORDERED, That the application of Joseph A. Ryan (File No. BPH-820624AX) for authority to construct a new FM broadcast station at Chatham, Massachusetts IS GRANTED, the applicants of Spinnaker Communications, Inc. (File No. BPH-811210AH), HBZ Communications, Inc. (File No. BPH-820504AR), Dark Communications, Inc. (File No. BPH-820623AK) and Heather H. Stengel (File No. BPH-820624AZ) ARE DENIED, and the applications of Cape Radio, Inc. (File No. BPH-811120AQ) and Chatham Broadcasting Company (File No. BPH-820624BV) ARE DISMISSED; and

17. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and Enlarge Issues Pertaining to Heather H. Stengel, filed on February 14, 1985, by Cannon Communications Corporation IS DISMISSED as moot; and that the petition for leave to amend, filed on April 26, 1985, by Heather H. Stengel IS DENIED, and the amendment IS REJECTED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL *Member, Review Board*

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prevail over Cannon. Both offer fulltime management integration by a majority of their ownership, and their integration proposals both offer qualitative features not available with Cannon (*e.g.*, female ownership *plus* rich broadcast and communications experience).

FCC 84D-78

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Cannon Communications Corporation Chatham, Massachusetts	MM Docket No. 83-976 File No. BPH-811102AH
Cape Radio, Inc. Chatham, Massachusetts	MM Docket No. 83-977 File No. BPH-811120AQ
Spinnaker Communications, Inc. Chatham, Massachusetts	MM Docket No. 83-978 File No. BPH-811210AH
HBZ Communications, Inc. Chatham, Massachusetts	MM Docket No. 83-979 File No. BPH-820504AR
Quinn Communications, Inc. Chatham, Massachusetts	MM Docket No. 83-980 File No. BPH-820623AJ
Dark Communications, Inc. Chatham, Massachusetts	MM Docket No. 83-981 File No. BPH-820623AK
Joseph A. Ryan Chatham, Massachusetts	MM Docket No. 83-982 File No. BPH-820624AX
Heather H. Stengel Chatham, Massachusetts	MM Docket No. 83-983 File No. BPH-820624AZ
Chatham Broadcasting Company Chatham, Massachusetts	MM Docket No. 83-984 File No. BPH-820624BV
For Construction Permit for a New FM Station	

Appearances

Jerome S. Boros, Heidi P. Sanchez, and *Stuart Goldfarb* on behalf of Cannon Communications Corporation; *Roy R. Russo* and *Richard A. Helmick* on behalf of Cape Radio, Inc.; *David L. Hill* and *Robert R. Tiernan* on behalf of Spinnaker Communications, Inc.; *Jeffrey D. Southmayd* and *Merilyn M. Strailman* on behalf of HBZ Communications, Inc.; *Edward S. O'Neill* and *David G. Frolio* on behalf of Quinn Communications, Inc.; *Donald E. Martin* on behalf of Dark Communications, Inc.; *Eric S. Kravetz* and *Donald E. Ward* on behalf of Joseph A. Ryan; *Kathy J. Bible, Michael L. Glaser* and *Francis E. Fletcher* on behalf of Heather H. Stengel; *Robert G. Allen, Arthur V. Belendiuk* and *Leonard S. Joyce* on behalf of Chatham Broadcasting Company; and *Charles E. Dziedzic* on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: November 8, 1984; Released: November 13, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Cannon Communications Corporation (Cannon), Cape Radio, Inc. (Cape), Spinnaker Communications, Inc. (Spinnaker), HBZ Communications, Inc. (HBZ), Quinn Communications, Inc. (Quinn),[1] Dark Communications, Inc. (Dark), Joseph A. Ryan (Ryan), Heather H. Stengel (Stengel) and Chatham Broadcasting Company (CBC) for a construction permit for a new FM radio station on channel 298B at Chatham, Massachusetts.

2. In the *Hearing Designation Order* released September 30, 1983, (48 Fed. Reg. 45462, published October 5, 1983), the applicants were designated for hearing on the following issues:

1. To determine with respect to the following applicants whether, in light of the evidence adduced, the applicants are financially qualified: Cannon, Spinnaker.

2. If a final environmental impact statement is issued with respect to Stengel or CBC which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment,

(a) to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by Sections 1.1301 - 1319 of the Commission's Rules; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is qualified to construct and operate as proposed.

[1] On March 28, 1984, during the course of the hearing, Quinn voluntarily dismissed its application (TR. 376).

3. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to the air navigation: Cannon, Cape, Spinnaker, HBZ, Stengel, Quinn, Ryan, CBC.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in light of the evidence adduced, pursuant to the foregoing issues, which of the applications should be granted, if any.

3. By *Memorandum Opinion and Order*, (FCC 84M-297), released January 19, 1984, the following issue was added:

6. To determine, on a comparative basis only, whether Cape Radio, Inc. has properly maintained a public inspection file in the local community in accordance with Section 73.3526 (d) of the Commission's Rules, and, if not, the effect on Cape's comparative qualifications.

4. Summary Decision resolved the financial issue in favor of Cannon, by *Order*, (FCC 84M-994), released February 22, 1984; Issue 2, the Environmental Impact issue, was resolved in favor of the affected applicants: for CBC, by *Order* (FCC 83M-4623), released December 12, 1983; and for Stengel, by *Order* (FCC 83M-4620), released December 12, 1983. Summary Decision resolved the air hazard issue in favor of each affected party: for Cannon, by *Order* (FCC 84M-994), released February 27, 1984; for Cape, by *Memorandum Opinion and Order*, (FCC 83M-4250), released November 18, 1983; for Spinnaker, *Memorandum Opinion and Order*, (FCC 84M-597), released February 3, 1984; for HBZ, by *Memorandum Opinion and Order*, (FCC 84M-1312), released March 16, 1984; for Stengel, by *Memorandum Opinion and Order*, (FCC 84M-598), released February 3, 1984; for Ryan, by *Order*, (FCC 83M-4744), released December 19, 1983; and for CBC, by *Memorandum Opinion and Order*, (FCC 84M-851), released February 17, 1984. The financial issue directed against Spinnaker was resolved in favor of the applicant by *Order* of the Presiding Judge released June 7, 1984 (FCC 84M-2552).

5. As a result of the resolution of the foregoing issues by Summary Decision, the hearing went forward on Issues 4 and 5 and the special issue added against Cape. A prehearing conference was held on December 7, 1983 and hearing sessions were held on March 13, 27, 28, 29, 30 and April 2, 1984. The record was closed on April 2, 1984.

6. The applicants filed proposed findings of fact and conclusions of law on May 25, 1984. Reply findings were filed on June 15, 1984.

Findings of Fact

Cannon Communications Corporation (Cannon)

The Applicant

7. Cannon is a corporation organized under the laws of the Commonwealth of Massachusetts (Cannon Ex. 1). Lynn L. Landy is President, Treasurer, Clerk, Director and 100% shareholder of Cannon. (*Id.*)

Integration

8. Ms. Landy proposes to work 40 hours per week at Cannon's station as its General Manager (Cannon Ex. 3). In this position, she will hire and supervise the station's staff, develop programming concepts, and deal with station advertising representatives. (*Id.*)

9. Ms. Landy attended Wellesley College, Wellesley, Massachusetts, from 1955 to 1959, graduating with a B.A. in 1959. Following graduation, she worked in Boston until 1962. She returned to Boston the following year, accepting a position as Educational Art Editor at the Houghton Mifflin Company, and remained there until 1966 (Cannon Ex. 2, pp. 1-2; TR. 63, 73-75, 79).

10. In 1966, Ms. Landy relocated to New York. From 1966 to 1978, she was employed as a freelance art editor by the Houghton Mifflin Company, Holt Rinehart and Winston, Bantam Books, Noble and Noble, Amsco Publishing Company, Encyclopedia Britannica Educational Corporation, Time/Life Multi-Media, Parents Magazine, Research Reports, and Way Out Magazine. She had complete responsibility for the illustration programs of multiple educational textbooks and filmstrips (Cannon Ex. 2; TR. 63).

11. Ms. Landy also reared two children during the 1966 to 1978 period. Her children are now 11 and 16 years old. During the 1966-1978 period, Ms. Landy established Images, a contemporary graphics gallery in New York and Orleans, Massachusetts; she operated the gallery for seven years, from 1966 to 1973 (Cannon Ex. 2; TR. 63).

12. From 1971 to 1975, Ms. Landy was Chairman of the "Friends of Louise Wise Services, Inc. Thrift Shop," which raised funds for a non-profit family service agency in New York. (*Id.*) Ms. Landy has not been employed since 1978, but has performed volunteer work for the Horace Mann-Barnard Parents Association, in Riverdale, New York, since 1971, serving as President of its Executive Board for a two year term commencing May 15, 1982. (*Id.*)

13. Aside from her residence in New York, where she votes, Ms. Landy has lived in Chatham on a part-time basis since 1970 (Cannon Ex. 2; TR. 81). She originally spent three months per year in Chatham, but now spends 5-5½ months there, three months during the summer (June 1 to

Labor Day) and the remainder at other times in the course of the year (TR. 74-75, 80). Ms. Landy has participated in Chatham Town Meetings since 1970. Since 1974, Ms. Landy has been a member of the Stage Harbor Yacht Club, a Chatham organization with facilities open to the public-at-large. In the summer of 1982, she became a lifetime member of the Friends of the Eldridge Public Library in Chatham, a group established to raise funds for the library, which Ms. Landy serves as a volunteer worker. Ms. Landy was a founder, and since August 1983, has been a Director of the Friends of the Stage Harbor Waters, Inc., Chatham. Ms. Landy also is a fundraiser and the Director of Budget for this environmental information group. The group was founded to raise funds for and provide information concerning a general mapping of Chatham and its land use, in order to coordinate land and water use in the Chatham area, as well as to deal with water pollution problems. Since 1983, Ms. Landy has been a member of Monomoy Services, Inc., a Chatham organization which lends support to troubled teens (Cannon Ex. 2, p. 2; TR. 63, 64, 71-73, 77, 113-17, 119).

Diversification

14. Since 1981, Ms. Landy's husband, Richard Landy, has been Chairman of the Board, Secretary/Treasurer and major shareholder of Saw Mill Broadcasters, Inc. (Saw Mill), licensee of Class IV AM station WKNY, Kingston, New York, which operates at 1 kW day and 250 W night. Mr. Landy holds and/or subscribes to 63.9 percent of Saw Mill's stock. Kingston is 200 miles from Chatham, and is served locally by WGHO(AM), WBPM(FM), and a daily newspaper, *The Daily Freeman.*[2] (Cannon Ex. 4; TR. 65, 97). From 1980 to September 1983, Mr. Landy was also President and one-third shareholder of Oxford Communications, Inc., operator of a cable television system in Palm Beach County, Florida. (*Id.*) Pursuant to her husband's request, Ms. Landy served as a Director of Oxford Communications from March 1982 to August 1982, and received a 1.6% interest in the company as a gift from her husband (Cannon Ex. 4; TR. 89-90).

Auxiliary Power

15. Cannon proposes an auxiliary generator to provide energy in the event of power outages. Chatham experiences such outages periodically (Cannon Ex. 5; TR. 69, 86).

[2] Additionally, non-commercial FM station WFGB(FM) has been authorized, as well as television station WTZA. *Broadcasting/Cablecasting Yearbook 1984*, B-175, C-38.

Cape Radio, Inc. (Cape)

The Applicant

16. Cape is a Massachusetts corporation having the following three shareholders:

Name	*Ownership Interest*
Arleen P. Roberts	60%
Kathleen Clarke	20%
Carl A. Peters	20%

Mrs. Roberts is President, Treasurer, Clerk and a Director of Cape. Mrs. Clarke and Mr. Peters are each a Vice President and Director of the applicant (Cape Ex. 1).

Integration

17. Mrs. Roberts intends to work as General Manager of Cape's proposed station (Cape Ex. 2). She presently resides with her family in Longmeadow, Massachusetts, about 150 miles from Chatham, and proposes to live in Chatham during the week and return to Longmeadow for the weekends, weather and business permitting. (*Id.*)

18. Mrs. Roberts has been employed since graduating from the Chamberlain School of Retailing, in Boston, Massachusetts, in 1960 (Cape Ex. 6). From 1960 to 1964, she was employed by William Filene and Sons Co., initially in clerical and sales positions, but with promotions to an assistant buyer and a department manager. (*Id.*) From 1964 to 1965 she was employed by Sears Roebuck & Company, Natick, Massachusetts, as a comparison shopper (responsible for monitoring competition in new product lines to ensure that Sears carried comparable merchandise at a lower price) for the New England area. (*Id.*) From 1969 to the present she has been self-employed, doing free-lance fashion coordinator/commentator work for Blakes (1969-1978), Casual Corner (1978-1980) and other stores in the Greater Springfield area (1980 to the present). (*Id.*) Also, from 1974 to the present she has been involved in free-lance public relations generally in the Greater Springfield area. (*Id.*) From June 1982 to the present, she has produced, directed and hosted fashion and celebrity interview shows on the public access channel of the local CATV system, spending 2-3 hours per week at this activity (Cape Ex. 3). From March 1975 until November 1981, Mrs. Roberts devoted approximately 10 hours per week to her duties as clerk and director of the corporate licensees of Stations WARE, Ware, Massachusetts, WDEW, Westfield, Massachusetts and WUHN/WUPE(FM), Pittsfield, Massachusetts, acquiring some familiarity with radio broadcast operation.

19. Kathleen Clarke, a Black female, intends to work at Cape's station on a fulltime basis as Public Affairs Director (Cape Ex. 1 and 2). In this

capacity, she will have principal responsibility for ascertainment and programming responsive thereto. (*Id.*) She was born in Hyannis, Massachusetts (within Cape's proposed service area), lived on Cape Cod through high school, but then went to school and obtained employment in Boston and California until 1980, when she again took up residence in Hyannis (Cape Ex. 8). Mrs. Clarke graduated from Boston University in 1973, worked at the University as a counselor for students enrolled under a special admissions program from 1973 to 1975, and counseled first-time misdemeanor adult offenders for the Alameda (California) County Criminal Justice System in 1975-1976. From 1976 to 1980, she was a fulltime homemaker and a part-time student at California State University, Haywood (Cape Ex. 8).

20. From 1980 until 1981, Mrs. Clarke was a part-time instructor in English and oral communications at Fisher Junior College, Hyannis, Massachusetts. From 1981-1983 she did free-lance public relations work (producing and marketing promotions) for small businesses in the Hyannis area. Since May 1983, she has been employed full-time at Cape Cod Community College, West Barnstable, Massachusetts, as coordinator of Access, a program designed to recruit and retain minority and disadvantaged students interested in health careers. She is also enrolled as a graduate student in Boston University's School of Social Work, attending classes on the weekends. Since 1980, she has been a member of the Hyannis Chapter of the NAACP (Cape Ex. 8).

21. Carl A. Peters, an American Indian, will work at the station on a full-time basis, as Minority Affairs Director and as part of the station's general staff, doing whatever else needs to be done at the station (Cape Ex. 1 and 2; TR. 147, 149). His duties as Minority Affairs Director will entail contacting minority groups, obtaining public service announcements concerning their functions and activities, and ensuring that such announcements are broadcast (TR. 147-48). His duties will also include implementation of Cape's equal employment opportunity program to include recruitment and training of employees (Cape Ex. 2; TR. 146-47, 155).

22. Mr. Peters was born in Hyannis, Massachusetts in 1953, and has lived in Mashpee, Massachusetts from 1953 to the present, except for a period from March 1972 to October 1974 when he resided on Martha's Vineyard Island. Mashpee is within the predicted 1.0 mV/m contour of the proposed station (TR. 995). He graduated from high school in June 1971, and was employed by the New England Telephone Company as a repair service assistant and technician/lineman from February 1972 to October 1974. He was then employed as a laborer in the construction of new homes from October 1975 until April 1977, when he again was employed by the New England Telephone Company. Since November 1980, he has been a

sales representative for that company and its successor companies (American Bell Phone Center and AT&T Information Systems, Consumer Products Division). Since July 1983, he also has been a licensed fisherman in the town of Mashpee and, in his spare time, harvests and sells shellfish to retail fish markets in the Mashpee area (Cape Ex. 7).

Diversification

23. Allan W. Roberts, husband of Arleen Roberts, is President, Director and 70% shareholder of All Communications, Inc., which is 100% shareholder of Roberts Broadcasting, Inc., licensee of Station WUHN and WUPE(FM), Pittsfield, Massachusetts (Cape Ex. 4). All Communications, Inc. also owns 100% of the stock of Atlantic County Radio, Inc., licensee of Stations WIIN and WFPG(FM), Atlantic City, New Jersey. (*Id.*) Mr. Roberts is President, Treasurer and Director of Roberts Broadcasting, Inc. and President and Director of Atlantic County Radio, Inc. (*Id.*) As previously noted, Mrs. Roberts served as Clerk and Director of Roberts Broadcasting, Inc. from November 1, 1976 until she resigned on November 6, 1981. (*Id.*) She also served as Clerk and Director of Central Broadcasting Corp., licensee of Station WARE, Ware, Massachusetts, and of Radio Westfield, Inc., licensee of Station WDEW, Westfield, Massachusetts, when her husband owned those entities, but resigned those positions, as well, on November 6, 1981 (Cape Ex. 4; TR. 282). In each case, she served at the request of her husband and without compensation (TR. 325-26). Cape also utilizes the same communications law firm as have Mr. Roberts' stations (TR. 323-24).

Cape Public Inspection File Issue

24. Section 73.3526(d) of the Commission's Rules requires that an applicant for a new station construction permit maintain a public inspection file of the application and other related documents "in the community to which the station is ... proposed to be licensed." In November 1981, immediately subsequent to filing the construction permit application, Arleen P. Roberts, Cape's President, directed that a public inspection file be established at West Chatham, Massachusetts in the offices of Cape's local counsel (Exhibit 5).

25. In September 1982, Cape changed local counsel to an Orleans, Massachusetts firm. Mrs. Roberts assumed that Cape's public inspection file would remain in West Chatham at the offices of its former counsel, but, in fact, the Cape public inspection file, together with all other files, was forwarded to the law offices of Cape's new local counsel in Orleans, Massachusetts, a community located approximately 6 miles (a 10 minute drive by car) from Chatham (TR. 225, 243-45). Mrs. Roberts first became aware that there might be a problem as to the location of the Cape public inspection file in November 1983 when Cannon filed a petition to enlarge

issues against Cape; on November 15, 1983 Mrs. Roberts arranged to have the public inspection file returned to the West Chatham offices of Cape's former local counsel (Cape Ex. 5).

26. No principal of Cape had checked to ascertain the file's location prior to publishing notice that the file was located at the Chatham address. From the initial establishment of the public file until filing of Cannon's petition to enlarge issues, no Cape principal ever had seen the public file nor made any effort to ascertain its adequacy or location (Cape Exs. 1, 2; Ex. 5, p. 2; TR. 162, 169, 209, 220, 228-29, 245, 250, 267, 269, 273, 278).

Spinnaker Communications, Inc. (Spinnaker)

The Applicant

27. Spinnaker is a corporation organized under the laws of the Commonwealth of Massachusetts. The principals and owners of Spinnaker and their respective ownership interests are:

Name	*Office*	*Shares Owned/ Subscribed*	*Eventual Percentage Ownership*
Jenette Kerr	President	605/30	23.6
Phillip L. Redo	Vice President, Clerk Director	675/200	32.5
A. Rivas McGinley	Director	20/100	4.4
Nanci Donnellan	Director	—	—
Maria Redo	Director	—	—
S. Frank Redo	Director	0/50	1.8
George C. Tenney		0/50	1.8
Janet M. Tenney		0/50	1.8
William A. Calvert		0/150	5.5
David Collins		0/100	3.7
Stanley Walcyak		0/100	3.7
Robert Seay		20/100	4.4
Louis C. Cutolo, Jr.		20/10	.3
Barbara Clark		0/20	.7
William S. Litchfield		1/10	.4
Lance M. Trigg		0/25	.9
Herbert G. McKay		0/25	.9
George Critzbach		0/10	.9
Henri Landwirth		0/200	7.4
Thomas Pucci		1/10	.4
Craig Lohr		0/100	3.7
Eileen Our		4/20	.8
Rupert L. Nicholas, Jr.		0/10	.3

Spinnaker Ex. 2, Attachment A.

Integration

28. The following stockholders are proposed to be integrated into the operation of the station:

Name	*Ownership Interest*
Jenette Kerr	23.6%
Phillip Redo	32.5%
Robert Seay	4.4%
A. Rivas McGinley	4.4%
Rupert Nicholas, Jr.	0.3%
William Calvert	5.5%
Eileen Our	0.8%

29. Jenette Kerr, a resident of New York, New York, proposes to work at Spinnaker's station on a full-time basis as Public Affairs Director and Supervisor of News and Special Programming. She has been employed as a radio correspondent for ABC Radio News, New York, since April 1983, responsible for digesting breaking stories supplied by ABC reporters and the major wire services, and for writing hourly newscasts for ABC's "Contemporary Network." She broadcasts an average of five shows, five days a week, totalling eight minutes per hour (Spinnaker Ex. 1).

30. Ms. Kerr first became involved in broadcasting while attending college in Virginia, working at WDBJ-TV, Roanoke, Virginia, as an intern in the Public Affairs Department and, in the summer of 1976, in the News Department. After graduation, she was employed as a reporter and anchor at Stations WVLC/WLOM(FM), Orleans, Massachusetts, from August 1977 through March 1980. In this capacity, she gathered and edited news stories and produced hourly newscasts during afternoon drive time six days per week. She also produced and hosted a weekly public affairs program covering issues of local concern. She then was employed at Station WROR, Boston, from March 1980 to April 1983, as afternoon anchor, news reporter and co-producer/host of a weekly public affairs program. In addition, she wrote editorials (which service received an award for excellence from UPI) and weekly public affairs vignettes offering tips on health, energy and lifestyle issues. As a child, Ms. Kerr spent summers on Cape Cod with her family, attending summer camp and holding summer jobs as a teenager (Spinnaker Ex. 1).

31. Philip Redo, Jenette Kerr's husband, also resides in New York. He will be full-time General Manager of the applicant's proposed station. He presently is employed as an on-air announcer and Program Director at WLTW-FM in New York City, responsible for the format and execution of the material broadcast on the air, and the supervision of the station's air and news staff, and of the traffic, sales and engineering departments. His

prior broadcast experience includes employment at Stations WVLC/WLOM(FM), Orleans, Massachusetts, as Staff Announcer (summers, 1973-1977) and Program Director (May 1978-February 1980); KLIF, Dallas, Texas, as Assistant Program Director (February 1980-September 1980); WNEV-TV, Boston, Massachusetts, as an announcer/creative services (December 1982-June 1983); and WROR, Boston, as an announcer (September 1980-June 1983). Mr. Redo spent summers and other holidays with his family on Cape Cod, working in various capacities during summers while he was in college (Spinnaker Ex. 2, pp. 2-4).

32. Robert Seay will work as News Director of Spinnaker's station on a full-time basis. He has been employed at broadcast stations located on Cape Code since 1973 as a news reporter at Station WOCB, Yarmouth and WVLC/WLOM(FM), Orleans (from 1973-1976 and 1976-1980, respectively), and at WQRC, Hyannis, as News Director, from 1980 to the present. He has lived in Eastham, Massachusetts on Cape Cod since 1972. He is an elected member of the Eastham Conservation Trust, Inc., spending at least one hour per week seeking donations of land for private conservation; a founder of Nauset Fellowship, an organization formed under the auspices of the Unitarian Church; and was an elected trustee for the Eastham Public Library (Spinnaker Ex. 2, pp. 4-5).

33. William Calvert will work at the station on a full-time basis, spending half of his time as an on-air announcer and one-half of his time as Promotion Director (Spinnaker Ex. 2, p. 6; TR. 392-93; 395-96). Since 1976, he has been an announcer on a full or part-time basis at the following stations:

Stations/Location	*Dates*
WCOD Radio Hyannis, MA	6/83–Present
WDRC Radio Hartford, CT	4/83–6/83
WSRZ Radio Sarasota, FL	1/82–10/82
WCOD Radio Hyannis, MA	9/80–12/81
WVLC/WLOM Radio Orleans, MA	9/78–5/80
WJAR Radio Providence, RI	1/80–8/80

Stations/Location	*Dates*
WTAG Radio Worcester, MA	1/78–9/78
WDEW Radio Westfield, MA	9/77–12/77
WGRG Radio Pittsfield, MA	4/77–5/77
WCIB Radio Falmouth, MA	1/76–12/76

Except for brief periods, Mr. Calvert has lived on Cape Cod since 1963 and been a resident of Sandwich, Massachusetts since 1972. He donates his services to the Southeastern Massachusetts Chapter of the March of Dimes, assisting them in teleramas on local cable systems two or three times a year (Spinnaker Ex. 2, p. 7; TR. 394-95). He also attends the Sandwich Finance Committee Selectmen's meeting (Spinnaker Ex. 2).

34. A. Rives McGinley proposes to spend 20 hours per week as financial advisor to the Spinnaker station. He will be involved in sales and assist in the selection of a sales manager. McGinley will retain his present employment as an officer in the Business Development and Commercial Lending Department of the Bank of Boston, Barnstable, Massachusetts. He has resided in Orleans, Massachusetts since 1972, and was employed at WLVC/WLOM(FM) in Orleans from 1972 to 1981, in various capacities including Sales Manager, Operations Manager and General Manager. He currently is Vice President of the Orleans Historical Society, President of the French Cable Station Museum, and Treasurer of the Orleans Board of Trade Association (Spinnaker Ex. 2, pp. 5-6).

35. Rupert Nichols, Jr. will be a news reporter at Spinnaker's station, working 20 hours per week in that capacity. He is a life-long resident of Cape Cod, living for the past fourteen years in Yarmouthport, and has been employed as an announcer, on a part-time basis, by WCOD, Hyannis (1973-1974); WVLC/WLOM(FM), Orleans (1974-1980); and WOCB/WSOX(FM), West Yarmouth (1980-present). He is a member of the Executive Board of the Southeastern Massachusetts Chapter of the March of Dimes, Secretary of the Cape Cod Boat Dealers Association, and a member of the Blue Knights and of the CATV Advisory Board for the towns of Yarmouth and Harwich (Spinnaker Ex. 2, p. 6).

36. Eileen Our, a Chatham resident since 1960, will work 20 hours per week as the Chatham reporter in the station's news department, while keeping her job as an elementary school teacher in Chatham. She presently is a member of the Chatham Parks Commission, President of the Chatham Teachers Association, co-founder of Concerned Citizens of

Chatham and was Chairman, until 1977, of the Chatham Housing Authority (Spinnaker Ex. 2, p. 8).

Diversification

37. Neither Spinnaker nor any of its principals have any interest or connection with any other medium of mass communications (Spinnaker Ex. 2, p. 8).

HBZ Communications, Inc. (HBZ)

The Applicant

38. HBZ is a corporation organized under the laws of the State of Delaware for purposes of constructing and operating the proposed FM radio station at Chatham, Massachusetts. The principals of HBZ and their respective ownership interests and offices held are as follows:

Principal	*Office*	*Percentage of Shares Held*
Barbara O'Hara	Vice President Director	51
Richard J. Hayes, Jr.	President Chairman of the Board	29
Donald P. Zeifang	Secretary Treasurer Director	19
David M. Barrett	Vice President	1

HBZ Ex 1.

Integration

39. Barbara O'Hara, a white female, will devote at least 40 hours per week as full-time General Manager of HBZ's proposed FM station in Chatham, Massachusetts. Her responsibilities will include supervision of all personnel, management of day-to-day activities, management of budgetary and payroll responsibilities, and presentation of reports to the Board of Directors. (HBZ Ex. 4). O'Hara and Richard J. Hayes, Jr., HBZ's other integrated principal, intend to coordinate their activities in order to obtain maximum benefit from O'Hara's management experience and Hayes' broadcast experience (TR. 421-25).

40. O'Hara has been employed from September 1979 to the present, first as Associate Director, then as Director of Government Affairs for the American Society of Travel Agents, Inc. From 1974 to 1976, she worked as Office Manager and Executive Assistant to the President of the National Council for U.S./China Trade. From 1976 to 1979, O'Hara was Manager of Maison des Crepes Restaurant in Washington, D.C. (HBZ

Ex. 2). O'Hara will relocate to Chatham, Massachusetts, should HBZ's application be granted (TR. at 416).

41. Richard J. Hayes, Jr., a white male, will spend at least 40 hours per week as full-time General Sales Manager of HBZ's proposed FM station in Chatham, Massachusetts. Hayes' duties will include responsibility for marketing all commercial time on the station. As General Sales Manager, Mr. Hayes will report to the General Manager and to the Board of Directors (HBZ Ex. 4).

42. Hayes' broadcast experience includes his employment from September 1983 through March 1984 as General Sales Manager of WIGY(FM), Bath, Maine. Previously, Hayes served as General Manager of KTYD-FM in Santa Barbara, California, and General Manager of WWWK/WPRZ(AM-FM), Warrenton, Virginia. Hayes' experience at the Warrenton, Virginia stations included putting those stations on the air. From July 1980 through March 1981, he was Marketing Director of Citizens Cable TV, Inc., a cable TV company in New Haven, Indiana. In 1976, Hayes began attending law school at the Potomac School of Law. Hayes also devoted 15 hours a week to his duties as Vice President of Hayes Broadcasting Corporation, with responsibility for putting WEXI(AM) in Jacksonville, Florida, on the air and for planning, producing and implementing its format. His duties specifically included superintending construction, hiring employees, selling advertising time, training the employees, instituting the all-news format, overseeing programming and operations, and arranging finances (TR. 447). Mr. Hayes was a full-time law student from 1977-1979. During 1975-76, Hayes worked full-time as Sales Manager of WIVY(AM/FM), Jacksonville, Florida. Throughout his high school and college years, Hayes worked at various radio stations in Massachusetts, Virginia, Washington, D.C. and New York, including WRRC, WKQW, WEIM, WCAP, WMRC, WEAM, WAMU, and WAXC (HBZ Ex. 2; TR. at 442-54).

43. Mr. Hayes will relocate to Chatham if HBZ's application is granted (TR. at 453-54).

Diversification

44. Neither HBZ nor any of its principals has ownership interest in any other broadcast licensee, permittee or applicant, or any other medium of mass communications (HBZ Ex. 3).

Auxiliary Power

45. HBZ Communications, Inc. will install auxiliary power generating equipment at the proposed FM station at Chatham, Massachusetts in order to ensure continued operation in the event of a power outage or civil defense emergency (HBZ Ex. 5).

Dark Communications, Inc. (Dark)

The Applicant

46. Dark is a Massachusetts corporation having the following four shareholders:

Name	*Ownership Interest*
Edward J. Cochran	41%
Dennis A. Tallyn	39%
Lana P. Mercogliano	10%
James C. Markovic	10%

Mr. Tallyn is President and Director of Dark; Mr. Cochran is Vice-President, Secretary, Treasurer and a Director of Dark (Dark Ex. 1).

Integration

47. Mr. Cochran, a lifelong Cape Cod resident, except for the period 1968-1973, proposes to be General Manager of Dark's station, working there at least 40 hours per week. He presently resides in East Sandwich, Massachusetts and plans to move to Chatham if the Dark application is granted (TR. 520; 546). He has been General Manager of WEZE, Boston, Massachusetts, from 1978 until the present. Aside from generally overseeing that station's daily operations during that period, he initiated a live call-in discussion program originating from the Massachusetts State House, job exchange information broadcasts, programming concerning battered women, and has promoted annual drives to provide food and other services to the needy (Dark Ex. 2).

48. Prior to his employment at WEZE, Mr. Cochran worked in Massachusetts as an announcer at three different Boston area stations between 1965 and 1968; was Program Director of Songtime, Inc., in Braintree, from 1968-1969; was News Director of WAAB, Worcester, from 1969-1970; was News Director of WMEX, Boston, from 1970 to 1972; and was a news reporter and producer at WRKO, Boston, from 1972 to 1978. He served as a call member of the Sandwich Fire Department from 1974 to 1982, has served as a moderator and trustee of his church since 1981, and has been Vice Chairman of the Sandwich CATV Advisory Committee from August 1983 to the present (Dark Ex. 2).

49. Dennis Tallyn proposes to serve as Dark's Program Director for a minimum of 30 hours per week (Dark Ex. 3; TR. 493, 503-04). He currently is employed as an announcer at WNBC, New York, New York, a position which he has held since 1977. He held a similar position at WRKO, in Boston, from 1973 to 1977. He worked as Music Director and an announcer at WOKY, Milwaukee, Wisconsin, from 1972 to 1973, and at WMYQ, Miami, Florida, from 1971-1972. Prior to these jobs, he was Program Director, Music Director and an announcer at WSFR/

WSHE(FM), Ft. Lauderdale, Florida from 1968 to 1971, and at WYND, Sarasota, Florida, from 1966 to 1968 (Dark Ex. 3).

50. Tallyn currently resides in New York City but plans to seek suitable residence in the Chatham area if Dark's application is successful (Dark Ex. 3).

51. Lana P. Mercogliano, a resident of New Jersey, proposes to work as Sales Director of the Dark station for a minimum of 20 hours per week. Unlike other principals of Dark (or of the other applicants), she does not intend to reside within the service area of the proposed station after a grant of the application, although she does intend to maintain lodgings there for her use when she is in the area (Dark Ex. 4; TR. 773, 803).

52. Ms. Mercogliano intends to retain her current fulltime employment at WNBC in New York City, and perform her duties for the Chatham station in that city as well as in the service area. She will sell time for the station in New York and perform other duties which can be handled after regular working hours and on weekends (TR. 773-74).

53. Ms. Mercogliano has been employed at Station WNBC, New York, New York, since 1979, as an Account Executive (1979-May 1981), Retail Sales Manager (May 1981-September 1981), Local Sales Manager (September 1981-May 1982), General Sales Manager (May 1982-October 1982), and Sales Manager (October 1982-present) (Dark Ex. 4). In management positions at that station, she has been responsible for hiring, training and supervising the sales staff, setting prices, managing availabilities, attending advertising agency functions, and keeping informed of market conditions. (*Id.*) Prior to working at WNBC, Ms. Mercogliano was employed as a salesperson at WINS, New York, New York (1973-1977) and WVNJ, Newark, New Jersey (1977-1979). (*Id.*)

54. James Markovic intends to serve as Promotion Director of Dark's proposed station, devoting a minimum of 20 hours per week — averaged over the course of a year — to such duties (Dark Ex. 5; TR, 584, 605-06, 615). Mr. Markovic explained that he expects to spend more than 20 hours per week working for the station initially, and that less time will be required later, to arrive at this average. (*Id.*) He owns and is President of Rainbow Productions, Inc., which creates and produces radio and television programming, including public service and commercial announcements. He worked in various production-related positions at WNBC(AM) and WNBC-TV, New York, New York, from 1964 to 1969 (Dark Ex. 5).

55. Markovic currently resides in Ringwood, New Jersey, but he plans to seek a suitable residence somewhere in the Chatham area if Dark's application is successful (Dark Ex. 5; TR. at 588-89).

Diversification

56. Dark has no interest in any other business involving a medium of mass communication (Dark Ex. 1). None of Dark's principals own an interest in any medium of mass communications (Dark Exs. II-V).

Auxiliary Power

57. Dark proposes to install equipment to provide auxiliary power capabilities so that the proposed station could continue to operate during power outages (Dark Ex. 7).

Joseph A. Ryan (Ryan)

The Applicant

58. Joseph A. Ryan, a white male, is an individual applicant to construct a new FM radio station in Chatham, Massachusetts (Ryan Ex. 1)

Integration

59. If Mr. Ryan's application is granted, he will work at his station as its General Manager for at least 40 hours per week (Ryan Ex. 1, p. 9). He will oversee the totality of its operations, with an emphasis on its public service programming (Ryan Ex. 1, p. 9).

60. Mr. Ryan first became involved in mass communications while attending Boston College, as a student correspondent for the Boston Post newspaper. He continued working for that paper after graduation in 1951, and subsequently worked for the Boston Pilot newspaper and United Press International's Boston bureau until 1955. He then was employed by NBC in New York City, from 1955 to 1960. He first wrote for the NBC Press Department and the "Today" show, but was named Editor of Business and Trade News for the NBC-TV Network in 1957. He was principally responsible for developing and maintaining relations between network personnel (executives and personalities) and community leaders throughout the United States, and for communicating with the national trade and consumer press (Ryan Ex. 1, pp. 1-2).

61. Mr. Ryan left NBC in 1960 to return to Boston. He went to work for WBZ-TV as Director of Public Relations. He maintained relations with community leaders, the public, and the press. He also prepared speeches, wrote news and feature stories for the press, formulated public relations campaigns, and engaged in ascertainment. Mr. Ryan left WBZ-TV in 1970 to accept a position at the University of Massachusetts (Ryan Ex. 1, p. 2; TR. 950-51). Specifically, he joined the staff of the University president as the first Director of Public Affairs for the three-campus (Amherst, Boston, Worcester) system, a position established to improve relations between the University and the public, community leaders, the media, students and alumni (Ryan Ex. 1, pp. 2-3). He also was involved with the

programming of the University's radio station (TR. 987-88). Ryan left the University in September 1971, to accept the new position of Assistant Vice President of Boston Broadcasters, Inc. (BBI), and Director of Community Services for its new television Station WCVB-TV, Boston, Massachusetts (Ryan Ex. 1, p. 3).

62. Mr. Ryan helped prepare WCVB-TV for its on-air responsibilities by establishing, organizing, hiring and training staff for its Community Affairs, Public Service Programming, and Media Relations Departments; and he assisted in the organization of its News and Editorial Departments (Ryan Ex. 1, p. 3; TR. 953). Once the station commenced operations (March 19, 1972), his responsibilities included ascertainment programming, conducting surveys, and serving on various Boards. He also participated in the development of specific programs, coordinated the station's public service announcements, and served as the station's representative in dealing with some local groups.

63. Mr. Ryan left WCVB-TV in 1976, assuming the newly-created position of Administrative Director, Campus Relations, at the University of Massachusetts/Boston. In this position, which he held until 1979, he organized, developed and directed the following Departments: Public Affairs, Public Information, Community Relations, Publications, Advertising, Alumni Affairs and Special Events (Ryan Ex. 1, p. 6; TR. 960).

64. In 1979, Mr. Ryan founded Joseph A. Ryan Associates and started reviewing opportunities to acquire a radio broadcast station in the Cape Cod area (Ryan Ex. 1, p. 6; TR. 962-63). Joseph A. Ryan Associates is a public relations agency (Ryan Ex. 1, p. 6). It consists of about 26 communications specialists who work for the agency on a subcontractor basis, providing clients a variety of services including writing and editing, layout and graphic design, audio-visual production, photography and special events development (Ryan Ex. 1, p. 6; TR. 965-67).

65. If his application is granted, Ryan will turn the day-to-day operations of Joseph A. Ryan Associates (Associates) over to James W. Ryan (no relation), who presently is employed by Associates (TR. 939-40, 946). Joseph Ryan has known James Ryan for about 20 years and has previously discussed with him taking over the operation of Associates subject to Joseph Ryan's general supervision. In late 1983, James Ryan agreed he would do so (TR. 942-43, 962-63, 977-78). In the event James Ryan were unexpectedly incapacitated, Joseph Ryan could call on David Rich, who also has worked with Joseph Ryan and knows the operation, to run Associates (TR. 981). Joseph Ryan is confident that James Ryan will be able to run Associates successfully, so that he (Joseph Ryan) will need to devote no more than one or two hours per week to Associates, which supervision ordinarily will not require his presence outside of Cape Cod (TR. 940, 945, 981-82). While Joseph Ryan hopes to maintain his income

from Associates, he has other means of income, as well, and does not have to rely financially on Associates (TR. 957, 977).

66. Joseph A. Ryan has been a regular visitor to Cape Cod, the proposed service area of his station, for more than 50 years (Ryan Ex. 1, p. 8). He first decided to move to Chatham or South Orleans, an adjacent community, about ten years ago, at which time he began residing there on a part-time basis (TR. 937-38, 955). He has lived in South Orleans or Chatham on a substantially fulltime basis (*i.e.*, nine months per year) for the past two years, and intends to reside there on a fulltime basis in the future whether or not his application is granted (Ryan Ex. 1, pp. 8-9, TR. 962). Mr. Ryan lives eight months in South Orleans and one month in Chatham. His residence in South Orleans is about 3 minutes' driving time from the Chatham town limits (TR. 988). He also maintains a residence in the town of Hingham, about 80 miles from Chatham (TR. 936-37).

Diversification

67. Mr. Ryan has no interest in any medium of mass communications (Ryan Ex. 1, p. 9).

Heather H. Stengel (Stengel)

The Applicant

68. Heather H. Stengel, a white female, is an individual applicant to construct a new FM radio station in Chatham, Massachusetts (Stengel Ex. 1).

69. Stengel proposes to devote at least 40 hours a week as General Manager (Stengel Ex. 1).

70. At present, she is an Associate Attorney in a Denver, Colorado law firm, a position she has held since 1982, after graduating from law school and being admitted to the Colorado Bar (Stengel Ex. 1; TR. 847-48, 856). In this position, she prepares corporate registration statements for filing with the SEC, and documents such as proxy statements for corporate shareholders meetings (TR. 856). Prior to her employment at that firm, she had held a number of summer jobs during school vacations, working as a waitress, a motel desk clerk or helping her mother on a part-time basis to manager her mother's motel (TR. 864-65, 885).

71. She has no experience in broadcasting, has taken no classes on the subject, and has never sought employment in the field (TR. 858-59, 901-02). When she was in college, she once visited the college's station, but recalls little or nothing about it (TR. 893). She filed her application while still a law student, after a former college roommate mentioned that a channel had been made available in Chatham, because she perceived it as an opportunity to return to Cape Cod, where her mother and other family members now reside (TR. 854, 880). She has no record of involvement in

any public service or civic activity (Stengel Ex. 1). Ms. Stengel lived with her mother in West Harwich, Massachusetts, 8 miles from Chatham, for a period of four years from 1969 to 1973. She also resided in West Harwich, Massachusetts at the Salt Meadow Inn, a motel owned by her mother, three months per year during the summers of 1974 to 1980 (TR. 844-45). West Harwich is within the 1.0 mV/m contour of Ms. Stengel's proposed station (Stengel Ex. 2; TR. 841). Ms. Stengel did not attempt to take the Massachusetts Bar after graduation from law school in order to establish a career in the Cape Cod area (TR. 847-48). Moreover, in seeking employment with the Denver law firm where she is now an Associate, she did not disclose her Chatham application or her plans to move to Chatham in the event of a grant and has to date not revealed her plans to her employer (TR. 850-52).

Diversification

72. Stengel owns approximately .01% in StarCom, Inc., Denver, Colorado, which owns SMATV systems in Phoenix, Arizona. Stengel also owns less than .01% of TeleMedia International, Inc., an organization based in Denver which provides consulting and training services to the telecommunications industry. These interests are held as an investment. Stengel is not involved in the operation of these companies in any way.

Auxiliary Power

73. Stengel intends to install an auxiliary power source for the Chatham FM station to assure continued service in the event of a power failure (Stengel Ex. 1).

Chatham Broadcasting Company (CBC)

The Applicant

74. CBC is a partnership which originally had three partners, Anna M. Roderick, Raymond Nelson, Jr. and Rosemary Nelson. Rosemary Nelson has a 90% equity interest and Anna Roderick and Raymond Nelson, Jr. each had a 5% interest. By amendment of January 3, 1984, after the "B" cut-off date in this proceeding, CBC reported the withdrawal of Anna M. Roderick and the assumption of her interest by Raymond Nelson, Jr. That amendment was accepted by the Presiding Judge for reporting purposes only. See *Order* FCC 84M-599, February 3, 1984. Thus, while the equity in CBC is presently owned 90% by Rosemary Nelson and 10% by Raymond Nelson, Jr., for comparative purposes the evaluation of CBC must be made without giving effect to the comparative improvement resulting from CBC's post "B" cut-off date amendment.

Integration

75. Mrs. Nelson is a white female, and, as previously noted, a 90% general partner of CBC (CBC Ex. 1). She proposes to devote 40 or more hours per week to the station as General Manager, which will be her only employment (CBC Ex. 3, p. 1; Ex. 2, p. 1).

76. Mrs. Nelson has resided in East Orleans, 5 miles from Chatham on Cape Cod, (within the proposed service area), since October 1977 (CBC Ex. 2, p. 2; TR. 713). From 1957 to 1960, she resided in Sandwich, Massachusetts, 30 to 40 miles from Chatham and maintained a vacation home in Sandwich from 1964-1967 (CBC Ex. 2, pp. 1-2; TR. 716). She will move to Chatham should the CBC application be granted (CBC Ex. 2, p. 1; Ex. 3, p. 1).

77. She has been involved in Chatham and Cape Cod area community life all of the time she has resided on Cape Cod. While at Sandwich, Mrs. Nelson assisted her husband with the ministerial duties of the Federated Church of Sandwich. Since 1977, she has been an active member of the Church of the Holy Spirit, Orleans, Massachusetts, and the Chatham Chapter of Women's Aglow (CBC Ex. 2, p. 2). In addition, her home has been shared as a Christian guest house (CBC Ex. 2, p. 2). She will curtail these activities in the event of a grant, but still expects to devote about 20 hours per week to her "personal ministry" (TR. 739; 741).

78. Prior to moving to East Orleans in 1977, Mrs. Nelson had attended Wheaton College in Norton, Massachusetts; worked as a secretary for a bank while helping support her husband through school; assisted her husband, as previously noted, in his work as a minister; founded and served as Business Director of the Westmont School in Chester, New Jersey; and, with her husband, founded the Ulster Academy in Kingston, New York (CBC Ex. 2).

79. Raymond Nelson, Jr. is a 10% general partner of CBC (CBC Ex. 1; TR. 691). He is Rosemary Nelson's son (TR. 630). He proposes to serve as fulltime Sales Manager and Program Director, 40 hours or more per week. This will be his only employment (CBC Ex. 6).

80. From 1981 to 1982, Nelson worked as a Sales Account Executive at WDLW, Waltham, Massachusetts responsible for developing new accounts, serving existing clients, preparing contracts, writing copy, and assisting in the production of spots (CBC Ex. 5, p. 2). He currently is a restaurant disc jockey in Boston, Massachusetts (CBC Ex. 5, p. 2).

81. Nelson, born in 1956, lived in Sandwich, on Cape Cod in his early childhood. Between 1975 and 1977 he attended the University of Massachusetts. In 1977, he moved back to the Cape Cod area to East Orleans. During the summer of 1977, he worked in Harwich, Massachusetts and during 1978 to 1981 managed a ski center in Highmount, New York (CBC

Ex. 5, pp. 1-2). He will move to Chatham upon grant of the CBC application (CBC Ex. 5, p. 1).

Diversification

82. Neither CBC nor its partners have any interest in a medium of mass communications (CBC Ex. 4).

Comparative Coverage

83. Without objection of the Bureau, all applicants to the proceeding have stipulated that "the distinctions between the technical proposals of the applicants . . . are immaterial" and that "resolution of the areas and populations issue . . . is of no decisional significance" (Joint Engineering Exhibit and Stipulation, Joint Ex. 1; TR. 413).

Ultimate Findings and Conclusions

84. This proceeding involves nine mutually exclusive applicants seeking a construction permit to build a new FM station in Chatham, Massachusetts. During the hearing, one of the applicants (Quinn Communications, Inc.) voluntarily elected to dismiss its application. Thus, eight applicants remain and they will be comparatively considered[3] under the Commission's *1965 Policy Statement On Comparative Broadcast Hearings (Policy Statement)* (1965), 1 FCC 2d 393. However, before proceeding to the general comparative evaluation, consideration will be given to the special comparative issue designated against Cape Radio, Inc. regarding its failure to maintain a public inspection file in its specified community.

Cape Public Inspection File

85. Cape has admitted that its public inspection file has been maintained for a 14 month period in Orleans, Massachusetts rather than the proposed city of license, as required by Section 73.3526(d) of the Rules. During this period, no principal of Cape either directly or indirectly supervised maintenance of the file and there was a complete failure to coordinate the disposition of the public file between its former West Chatham counsel and its Orleans counsel. Mrs. Roberts, who was responsible for the public file, merely assumed it was in the proper location without taking any steps to ascertain where the file was actually located.

86. The failure of Cape to maintain a public inspection file in its specified community constitutes a violation of Section 73.3526(d). This violation resulted primarily because of Mrs. Roberts' failure to give proper attention to this matter. A slight comparative demerit will be

[3] All basic issues have previously been resolved by summary decision.

assessed against Cape for this rule violation. *Julie P. Miner (KDXU)*, 51 FCC 2d 1163 (1975).

General Comparative Evaluation

87. The Commission's comparative policy statement enumerates two primary objectives toward which the process of comparison should be directed; (1) the best practicable service to the public; and (2) a maximum diffusion of control of the media of mass communications. In evaluating the significance of media interests under the diversification criteria, media holdings in the proposed community of license will normally be of most importance, followed by other interests in the remainder of the service area, and finally, by interests in the nation generally. *Policy Statement*, at 395. Other important factors to weigh are the degree of the applicants' ownership and control in these media, and their significance in terms of size and coverage, and in relationship to other media in their respective areas.

88. In considering the diversification factor, the Commission not only considers the existing media ownership of the applicant's principals, but also the existing media ownership of the principal's spouses. Recognizing the strong "community of interest" between husband and wife, the Commission has long held that the media ownership of an applicant's spouse is attributable to that applicant for diversification purposes. *Angeles Broadcasting Network*, FCC 84-439, 54 RR 2d 915 (1984), *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 49 RR 2d 606 (1981), *Miller and Schroeder*, 59 FCC 2d 398, 36 RR 2d 1699 (1976).

89. Two of the applicants are chargeable with media interests. Lynn Landy, the 100% owner of Cannon, and her husband, respectively owned 1.6% and 33.3% of Oxford Communications, Inc. (Oxford) as of October 22, 1982, the "B" cut-off date. Oxford operated a CATV system in Palm Beach County, Florida. Mr. Landy was also an officer/director and 63.9% owner of the licensee of AM broadcast station WKNW, Kingston, New York. Mr. Landy's media interests are attributable to Mrs. Landy for diversification purposes under Commission precedents. See *Alexander S. Klein, Jr.*, cited *supra*. Thus, in this proceeding Cannon is charged with a 34.9% interest in a Palm Beach County, Florida CATV system and a 63.9% interest in a full-time Kingston, New York AM broadcast station. Kingston is located approximately 200 miles from Chatham and is served by two other radio stations and a daily newspaper. The Florida CATV system is far removed from Chatham, Massachusetts and Cannon's interest is less than controlling. Moreover, CATV interests are generally not as significant as broadcast interests under the Commission's diversification criteria. *Greater Wichita Telecasting, Inc.*, FCC 84-72, released March 16, 1984. Thus, the CATV interest charged to Cannon cannot be

considered very important under the diversification criteria. Nevertheless, under diversification Cannon's chargeable media interests would place Cannon behind other applicants which do not have such interests.

90. The other applicant with chargeable media interests is Cape Radio, Inc. While Arleen P. Roberts, the 60% owner, President and Director of Cape has no media interests, her husband, Allan W. Roberts has a 70% interest in a company which owns 100% of the stock of the corporate licensees of AM/FM stations in Pittsfield, Massachusetts and AM/FM stations in Atlantic City, New Jersey.

91. Cape argues that it has been denied the opportunity to rebut the presumption of spousal attribution because its exhibit addressed to this matter was rejected. Such exhibit, which set forth plans that were formulated, prepared and submitted after the "B" cut-off date, purported to establish a separation of the radio interests of Arleen Roberts from those of Allan Roberts. It was in the nature of a divestment statement usually made by a comparative applicant so that a media interest is not considered under diversification. But the exhibit that was offered was not signed or executed by Mr. Roberts notwithstanding that it contained representations regarding his purported future plans and activities. The exhibit further dealt with the disposition of property in the event of the incapacity of Arleen Roberts or Allan Roberts, but no will or other documentary evidence signed by Mr. Roberts was exchanged. The exchanged exhibit regarding Mr. Roberts was hearsay, legally incompetent, and because of the manner in which it was presented of no legal import (Tr. 214). Moreover, no evidence was introduced that the Roberts were divorced or separated or that they have in the past conducted their affairs in such a manner that the Commission's policy of spousal attribution for diversification purposes should not be applied in this case. Indeed, quite to the contrary, Mrs. Roberts previously served as clerk and Director of Roberts Broadcasting, Inc. without compensation at the request of Mr. Roberts. She will also rely on Mr. Roberts for support once Cape's station has commenced operation (Tr. 325-26). Mrs. Roberts cannot be deemed to be so fully independent of and unrelated to Mr. Roberts' interests so as to defeat the Commission's spousal attribution policy.[4]

92. The remaining applicants are not chargeable with any media interests. While Stengel has a minute interest in a company which owns SMATV systems in Phoenix, Arizona, and an equally minute interest in an organization which provides consulting and training service to the

[4] The exhibit offered by Cape to rebut the Commission's spousal attribution policy was hearsay, legally incompetent and nothing more than a transparent attempt to upgrade the application. The exhibit, which purported to deal with the future ownership and control of the station, was in conflict with the application itself which stated that there were no such documents. No amendment changing this response was ever filed.

telecommunications industry, such interests[5] are decisionally insignificant under the Commission's diversification criteria.

93. Stengel argues that Ryan should receive a diversification demerit because of his ownership of Joseph A. Ryan Associates (Associates). Stengel characterizes Associates as a media relations/promotion business, which, according to Stengel, operates like an advertising agency. Relying on *Mid-Florida Television Corp.*, 33 FCC 2d 1, 10 (1972), Stengel argues that a potential conflict of interest exists which warrants the imposition of a demerit under the diversification criteria. This argument is rejected. As Ryan points out in his reply findings, the potential conflict that may exist in a licensee/advertising agency relationship, does not exist with respect to the activities of a public relations firm such as Associates. Moreover, *Mid-Florida Television Corp.*, cited *supra*, has been effectively reversed by *Golden West Policy*, 87 FCC 2d 668 (1981). Thus, there is no basis for imposing a diversification demerit on Ryan because of his ownership of Joseph A. Ryan Associates, even if Stengel's argument that such firm should be treated as an advertising agency is considered meritorious. Under the Commission's diversification criteria, Spinnaker, HBZ, Dark, Ryan, Stengel, and Chatham are considered equal. Cannon, because of attributable media interests, is next and Cape follows Cannon. The attributable interests of Cape are greater than the attributable interests of Cannon. Specifically, Cape is chargeable with four stations, two of which are in the state of Massachusetts. Cannon is chargeable with an interest in a fulltime Kingston, New York radio station and an interest in a cable system in the state of Florida.

94. In summary, Spinnaker, HBZ, Dark, Ryan, Stengel and Chatham have no media interests cognizable under the Commission's diversification criteria.

Integration

95. In determining which applicant will insure the best practicable service to the public, the Commission, in its *Policy Statement On Comparative Broadcast Hearings*, stated that consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners — including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because, "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated," *Policy Statement*, *supra* at 395. Fulltime, or almost fulltime participation in station operation by owners is of primary interest, particularly when coupled with local residence, broadcast experi-

[5] The interests are .01% or less.

ence and past participation in civic affairs. Part-time participation is of lesser importance. Indeed, participation in station operation must be at least 20 hours a week for integration credit. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (1979).

96. The following applicants propose 100% fulltime integration of its principals: Cannon, Cape, Ryan and Stengel.

Cannon

97. Cannon is entitled to 100% fulltime quantitative integration credit for Lynn Landy's proposed participation as general manager. This quantitative credit is enhanced by Cannon's 100% female ownership. *Horne Industries, Inc.*, 54 RR 2d 249 (Rev. Bd. 1983). Mrs. Landy's part-time residence in Chatham since 1970 and her commitment to live in Chatham fulltime if Cannon is awarded the construction permit entitles Cannon to enhancement credit. *See, Radio Jonesboro, Inc.*, 55 RR 2d 991 (Rev. Bd. 1984); *Alexander S. Klein, Jr., supra*; *Policy Statement on Comparative Broadcast Hearings (Policy Statement)*, 1 FCC 2d 393, 396, 5 RR 2d 1901, 1910 (1965). Cannon is also entitled to enhancement credit for Mrs. Landy's participation in Chatham organizations and town meetings and auxiliary power.

Cape

98. Cape is entitled to 100% fulltime quantitative credit for the proposed participation of Arleen P. Roberts, Kathleen Clarke and Carl Peters as, respectively, general manager, public affairs director and minority affairs director. Cape's quantitative integration credit is enhanced by its 80% female ownership; Cape is also entitled to enhancement credit for the 40% minority ownership of Clarke and Peters. *See, Horne Industries, Inc., supra.* Cape merits a slight enhancement for the proposed residence of a 60% owner in Chatham and the current, as well as past, residence of 40% of its ownership within the proposed 1.0 mV/m service area. *See, Radio Jonesboro, Inc., supra. Alexander S. Klein, Jr., supra, Policy Statement, supra.* The civic participation of Clarke (a member of the Hyannis Chapter of the NAACP since 1980) and Peters (a member of the Wampanoag Tribal Council since 1974) entitles Cape to enhancement credit for these civic activities of its 40% owners. *See, Waters Broadcasting Corp.*, 52 RR 2d 1063 (1982). Finally, Cape merits a very slight enhancement credit for the past broadcast experience of its 60% owner, Arleen Roberts. *Radio Jonesboro, Inc., supra.*

99. Several of the applicants attack the Cape proposal. Specifically, it is argued that the bulk of Peters' time will not be spent in management or supervisory activities; that Peters and Clarke did not pay for their stock; that Roberts' commitment is not on-going and that her commuting from

Chatham to her residence in Longmeadow on weekends casts doubt on her integration proposal.

100. It appears rather clear that Roberts recruited both Clarke and Peters and gave them stock interests in Cape to enhance the comparative posture of the Cape application. While some of the applicants question whether Cape should receive integration credit for Clarke and Peters, the Commission in the past has credited minority ownership and integration where a stock interest was awarded as a gift. *Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981). Here, Clarke and Peters have agreed to assume fulltime important positions at the radio station.[6] While some of Peters' duties will not be managerial or supervisory, he will be the minority affairs director and such position received full integration credit in *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (1982). No adequate basis has been presented to award less credit here.

101. Nor is there any reasonable basis for finding that Mrs. Roberts would not or could not effectuate her integration commitment or that such commitment would entail such burdens and sacrifices as to be unrealistic. The claim that Roberts' commitment is not on-going is purely speculative. Moreover, the fact that Roberts intends to commute between Chatham and her residence in Longmeadow on weekends, a three hour drive, does not undermine her commitment. Seven days a week on site presence is not required for integration credit. *Greater Wichita Telecasting, Inc.*, 92 FCC 2d 780. There is simply no reasonable basis for discrediting Mrs. Roberts' integration proposal.

Ryan

102. Ryan is entitled to 100% fulltime quantitative integration credit for his commitment to be general manager. Ryan's integration credit is enhanced because of his solid past broadcast experience, his part-time residence within the service area for the last ten years, including nine months per year during the past two years. *Radio Jonesboro, Inc., supra.*

103. Several of the applicants challenge Ryan's integration proposal and argue that Ryan, because of his interest in Joseph A. Ryan Associates (Associates), will be unable to meet his commitment to devote at least 40 hours per week to the station as general manager. But Ryan has shown

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[6] Clarke and Peters did not pay for their minor stock interest, but this should not disqualify them from being considered true and actual owners. They recognize they have a minor stock interest in Cape and that Mrs. Roberts is in control. In this connection, the Commission has long recognized that lack of financing has been an obstacle to minority ownership and participation in broadcasting. (*See* for example, *Financial Qualifications Standard for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978). Thus, the assistance provided to Clarke and Peters in obtaining their minor stock interests fosters the Commission's policy and objective of increasing minority ownership and participation in broadcasting and should not be held against them.

that he has made arrangements for a long-time associate to run the business and the other applicants have introduced no evidence that Ryan will not or cannot fulfill his commitment. The challenges to Ryan's integration proposal are based on conclusory and speculative arguments that his plans are "not plausible", not "realistic", or "impractical". Speculative arguments such as these are insufficient to undermine a specific and well-explained integration commitment. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 591 (1983). Ryan will spend two hours a week on Associates affairs and an additional 40 hours a week at his station. Such an arrangement and work schedule are neither unreasonable nor extraordinary. Ryan is entitled to full integration credit and the arguments to the contrary are rejected. *Bradley, Hand and Triplett*, 89 FCC 2d 657 (1982).

Stengel

104. Stengel is entitled to 100% fulltime quantitative integration credit for her commitment to be general manager. Stengel is also entitled to enhancement for 100% female ownership, enhancement for past residency (1969 - 1973 and summers of 1974 through 1980), in the service area, auxiliary power, and her proposed residency in Chatham. However, the enhancement credit for past residency in the service area is not as great as some of the other applicants because Stengel has been a full-time resident of Colorado for the last several years where she has attended law school and practiced law.

105. Several of the applicants would discredit Stengel's integration proposal because she lacks past broadcast experience. But this constitutes no basis for refusing to award quantitative integration credit. *Family Broadcasting Group*, 93 FCC 2d 771, 776 (1983).

106. Stengel's basic credibility is attacked. Specifically, it is claimed that Stengel has a tendency or predilection to deception and "concealment". This argument stems from Stengel's failure to inform her current employer that she filed the instant application and because she did not reveal to her employer the precise reason for her trip to Washington to testify in this proceeding. The fact that Ms. Stengel did not tell her current employer about an application which may or may not be granted and which does not conflict or interfere with her employment, does not show deception or a lack of credibility. It is a private matter which Ms. Stengel is under no obligation to discuss with her employer. Ms. Stengel has no employment contract with her law firm and is under no obligation to inform them of her application (Tr. 897). If and when a grant to Stengel becomes final, she will immediately inform her employers of this fact and will give them notice that she is leaving (Tr. 863). Nothing more is

required and the arguments that Stengel engaged in deception or concealment adversely impacting on her integration proposal are rejected.

107. It is also argued that Stengel did not state in enough detail what she will be doing at the station; that she will hire a team of "experts" and let them make the decisions; and that her integration proposal should not be credited. These arguments are rejected. Stengel explained her role as general manager and the duties she intends to perform in that capacity (Tr. 857-910). For example, she will hire employees, supervise construction of the station; set advertising rates; make decisions regarding programming; and make the management decisions at the station. Stengel is proposed as the fulltime general manager of the station and will perform the duties normally performed by a general manager. There is no basis for discrediting the proposal.[7]

108. The remaining applicants are proposing less than 100% integration. *HBZ* is credited with 80% integration. Specifically, Richard J. Hayes, a 29% owner, and Barbara O'Hara, a 51% owner, will function respectively as general sales manager and general manager. HBZ is also entitled to slight qualitative enhancements for the prospective local residency commitments of Hayes and O'Hara and the past broadcast experience of Hayes. *Radio Jonesboro, Inc., supra.* While several of the other applicants question O'Hara's commitment or ability to exercise her authority as general manager, no evidence was adduced which discredits her proposal. She will be accountable to the Board of Directors, but this does not diminish the credit to which O'Hara is entitled as the proposed fulltime general manager.

Dark

109. At best, Dark is proposing 80% fulltime integration (Edward J. Cochran 41% and Dennis A. Tallyn 39%) and 20% part-time integration (Lana P. Mercogliano 10% and James C. Markovic 10%). Because Tallyn is only proposing to devote 30 hours per week to the proposed station he is entitled to substantial integration credit, but not fulltime credit. *Van Buren Community Service*, 87 FCC 2d 1018 (1981). Moreover, the commitment of Markovic to average 20 hours a week over the course of the year, (more than 20 hours initially and less thereafter) does not smack of an enduring commitment entitled to full credit. Finally, the commit-

[7] The cases relied upon to discredit Stengel's proposal are not on point. For example, *WVOC, Inc.*, 45 FCC 2d 422 (1974) involved a proposal for a principal to visit the station for a few hours to consult with the general manager. *Deep South Radio, Inc.*, 71 FCC 2d 138 (1979) involved a principal who planned to consult with the general manager and perform a number of non-managerial duties; a proposal to devote "as much time as needed" was not credited in *Mt. Carmel Broadcasting Co.*, 13 FCC 2d 155 (1968). These cases involving part-time consulting/supervisory roles are a far cry from Stengel's proposal to be the general manager and to work 40 hours per week at the station.

ment of Mercogliano would appear difficult to effectuate. She proposes to retain her present fulltime position as sales manager with WNBC in New York and work on the Chatham station's business on weekends and as her other free time will permit. She will not reside in Chatham and her duties, like those of Markovic, appear more in the nature of consultancy work than the active and constant involvement in station management for which integration credit is awarded. In any event, Dark's proposal of 41% full and 39% substantial integration is quantitatively less than the 100% integration proposed by Cannon, Cape, Ryan and Stengel. Even if Dark is also given part-time credit for Markovic and Mercogliano,[8] Dark's integration credit is sufficiently below that of Cannon, Cape, Ryan and Stengel that the gap cannot be overcome by qualitative enhancement. *Cannon Point Broadcasting Co.*, 93 FCC 2d 643, 649 (1983).[9] It is well established that a clear quantitative difference in integration cannot be offset or overcome by qualitative factors.[10] *Van Buren Community Service Broadcasters, Inc.*, cited *supra.* Thus, Dark cannot be considered a serious contender for an integration preference in this proceeding.

CBC

110. CBC claims that it is entitled to 95% integration credit. This claim rests on the belief that because Rosemary Nelson, who has a 90% equity interest in the partnership and Raymond Nelson, Jr., who has a 5%[11] equity interest, will both be integrated fulltime in management capacities at the proposed station, a 95% integration credit is warranted. But CBC failed to produce its partnership agreement which establishes that the partners vote *per stirps* rather than *per capita.* During the hearing, CBC was placed on notice that unless the partnership agreement was produced, its partnership, particularly voting rights, would be interpreted in accordance with the Uniform Partnership Act. (Tr. 673). No agreement was produced[12] and under the Uniform Partnership Act, voting rights in a

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[8] It is clear that part-time integration is accorded much less credit than full-time integration. *Van Buren Community Service Broadcasters, Inc.*, cited *supra; Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (1982).

[9] In *Cannon Point*, an applicant proposed 76.3% fulltime and 21.7% part-time, but this was found sufficiently below a 100% fulltime integration proposal to eliminate consideration of qualitative factors.

[10] In *New Continental Broadcasting Company*, 88 FCC 2d 830, 850, a 12.5% integration difference was held to be a "clear quantitative difference".

[11] As of the "B" cut-off date, Raymond Nelson's equity interest was 5%. It is now 10% because he acquired the 5% equity interest of Anna Roderick when she withdrew from the partnership.

[12] CBC's argument that it has an "oral" partnership agreement whereby the voting interest is the same as the equity interest is rejected. Raymond Nelson testified repeatedly during the hearing that a written partnership agreement was entered into (*See* for example, Tr. 635, 644-46).

partnership is *per capita.* It is the voting rights, not the equity interest of the partners, which determines integration credit. *WHW Enterprises, Inc.*, 89 FCC 2d 799 (1982); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 5 (1978). Because CBC was originally a partnership with three partners and because one has withdrawn, the integration credit is limited to 66⅔%,[13] not the 95% as argued by CBC. With only 66⅔% integration credit, CBC cannot be considered a serious contender for an integration preference in this proceeding because there are several applicants with 100% integration.

Spinnaker

111. Spinnaker has proposed the fulltime integration of stockholder/subscribers collectively holding a 66% interest and the part-time integration of stockholder/subscribers collectively holding a 5.5% interest. Even if Spinnaker's proposal is fully credited, it is clear that the quantity of integration proposed (66% fulltime) is insufficient to render Spinnaker a contender for an integration preference in this proceeding. This is unfortunate because of all the applicants the Presiding Judge was most impressed with Spinnaker's principals, particularly Jenette Kerr and Philip L. Redo. They are sincere young professional broadcasters with solid first rate broadcasting experience who, together with Robert Seay, would provide a broadcast service of high quality. But factors enhancing Spinnaker's integration are not reached because the disparity in proposed fulltime integration is too great. *Van Buren Community Service Broadcasting, Inc.*, cited *supra.*

112. Spinnaker argues, in effect, that the Presiding Judge should disregard the Commission's policy statement on comparative hearings and precedent and rely on enhancement factors because stockholders owning a controlling interest in Spinnaker will be fully integrated. But this argument was specifically rejected in *Merrimack Valley Broadcasting, Inc.*, cited *supra.* The Presiding Judge is bound by the policy statement and precedent and must resolve comparative broadcast cases in accordance therewith. While the Presiding Judge is genuinely sympathetic to Spinnaker's argument, the radical departure from precedent and the Commission's policy statement here advocated by Spinnaker cannot be followed. Spinnaker simply has too little integration when compared to some of the other applicants to be helped by the qualitative factors which might otherwise favor its application.

113. The qualitative enhancement factors relating to the applicants proposing 100% full-time integration can be summarized as follows: *Cape*

[13] CBC cannot replace the partner who withdrew after the "B" cut-off date because this would constitute an impermissible upgrading. *Birmingham Family Television, Inc.*, 91 FCC 2d 348 (1982); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 834 (1981).

- 80% female and 40% minority integration; 40% local resident and limited civic participation in service area (Clarke and Peters); promise of Mrs. Roberts to move to Chatham and her slight broadcast experience. *Cannon* - 100% female integration; auxiliary power; part-time residence in Chatham since 1970 (three months a year and lately 5½ months) and the civic participation of Mrs. Landy, Cannon's sole stockholder, in Chatham organizations and town meetings. *Stengel* - 100% female integration; auxiliary power; past residence in the service area although such residence has not been recent; promise to move to Chatham. *Ryan* - solid past broadcast record; resident of service area for last ten years on part-time basis, including nine months a year during past two years.

114. No single enhancement factor tips the scale greatly in favor of any one of the four applicants proposing 100% fulltime integration. However, it would appear that Cape has more enhancement factors in its favor and is slightly favored on qualitative integration. A close second is Cannon. Of the four applicants, Cannon has the closest ties to Chatham because Mrs. Landy has resided there part-time since 1970 and has been involved in Chatham organizations. Stengel has no qualitative advantage over either Cape or Cannon. Cannon's 100% female integration matches Stengel; Cape's 80% female and 40% minority integration at least matches Stengel's. Stengel's auxiliary power is equaled by Cannon. Stengel has not been a recent resident of the service area because she attended law school in Denver and has been practicing law there. Thus, of the three applicants proposing female integration, Stengel is ranked behind Cape and Cannon. As between Stengel and Ryan, Ryan's substantial part-time residence within the service area (which for the last several years has been nine months a year) is superior to Stengel's because such residence has been continuous and current while Stengel's residence within the service area is not of a current nature.[14] Also, of the four applicants proposing 100% fulltime integration, Ryan has the most solid broadcast experience. Ryan's past broadcast experience, which is entitled to only slight enhancement credit,[15] and his greater credit for part-time residence within the service area are not quite enough to overcome Stengel's 100% female integration, auxiliary power, her past ties to the service area, and her promise to move to Chatham. *Cannon Point Broadcasting Co.*, 93 FCC 2d 643. On the basis of qualitative enhancement factors the order of finish is Cape, Cannon, Stengel, and Ryan.

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[14] However, Ryan's nine month per year residence in the service area is very recent. It is not equivalent to long-time local residence and it is not entitled to the same credit.

[15] The *Policy Statement* holds broadcast experience to be "of minor significance". 1 FCC 2d at 396.

Overall Comparison

115. Considering both diversification and qualitative integration, it appears that while Cape has a slight edge on qualitative integration, it is last on diversification. Moreover, its slight advantage on qualitative integration is not nearly sufficient to offset its diversification disadvantage resulting from Mrs. Robert's attributable media interests which consists of, *inter alia*, two radio stations in Massachusetts. Also, Cape has been assessed a slight demerit for violating Section 73.3526(d). On an overall comparative basis, Cape ranks last among the four applicants proposing 100% fulltime integration.

116. Cannon is preferred over both Stengel and Ryan on qualitative integration, but has attributable media interests. Specifically, Mrs. Landy has a 1.6% interest in a cable system in Florida[16] and her husband has a controlling interest in WKNW, Kingston, New York. The less than controlling interest in the distant cable system chargeable to Cannon is *de minimus* from a diversification standpoint. Moreover, the radio station attributable to Cannon is located 200 miles from Chatham, is in a different state, and is in a community served by two other stations and a daily newspaper. From a practical standpoint there is no possibility that an award to Cannon would impair the Commission's diversification objectives by limiting the sources of news and viewpoints locally, regionally, or nationally. Nevertheless, this is a close case and in such situations small differences loom large. The question boils down to whether the advantage Cannon enjoys over Stengel and Ryan on qualitative integration is great enough to offset the slight diversification demerit visited upon Cannon because of the spousal attribution of a radio station. In this connection, the one qualitative factor in favor of Cannon not enjoyed by either Ryan or Stengel is that Mrs. Landy has been a part-time resident of *Chatham* since 1970 and has participated to a limited extent in civic activities. But this is not enough because Mrs. Landy's residence has only been part-time and because both Ryan and Stengel also have residential ties to the service area.[17] Thus, on an overall comparative basis Cannon is ranked behind both Stengel and Ryan. But the difference is not great.

117. Stengel, as noted, enjoys an ever so slight preference over Ryan on qualitative integration and they are equal on diversification. Thus, on an overall comparative basis, Stengel's application is preferred by the very slightest of margins in what is perceived as a close case among Cannon, Ryan and Stengel.

Accordingly, IT IS ORDERED that the application of Quinn Communications, Inc. IS DISMISSED;

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[16] Mr. Landy also has an interest (33.3%) in this system.

[17] Part-time residence warrants less credit than fulltime residence. *Thomas C. and Essie L. Collins*, 93 FCC 2d 467 (1983).

IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.271 of the Rules,[18] the application of Heather H. Stengel for a construction permit for new FM station in Chatham, Massachusetts IS GRANTED and the competing applications of Cannon, Cape, Spinnaker, HBZ, Dark, Ryan, and CBC ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH STIRMER, *Administrative Law Judge*

[18] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Reconsideration

Petition for reconsideration of *Debra D. Carrigan*, FCC 85R-26, released March 20, 1985, denied.
—*Debra D. Carrigan*
MM Docket No. 83-858

FCC 85R-37

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
Debra D. Carrigan North Las Vegas, Nevada	MM Docket No. 83-858 File No. BPH-810908AH
Constance J. Wodlinger North Las Vegas, Nevada	MM Docket No. 83-859 File No. BPH-820322AW
Silver State Communications, Inc. North Las Vegas, Nevada	MM Docket No. 83-860 File No. BPH-820414AF
MCB Broadcasting of Nevada, Inc. North Las Vegas, Nevada	MM Docket No. 83-862 File No. BPH-820415AD
Las Vegas Electronics, Inc. Paradise, Nevada	MM Docket No. 83-863 File No. BPH-820415AM
New Radio, Inc. North Las Vegas, Nevada	MM Docket No. 83-865 File No. BPH-820415AZ
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 1985; Released: May 6, 1985

BY THE REVIEW BOARD:

1. In a *Decision*, FCC 85R-26, 100 FCC 2d 721, released March 20, 1985, the Review Board granted the application of Debra D. Carrigan (Carrigan) for authority to construct a new FM broadcast station on Channel No. 281C in North Las Vegas, Nevada and denied five competing applications, including that of Las Vegas Electronics, Inc. (LVE), which had proposed Paradise, Nevada as its community of license. In so doing, our *Decision* reversed the *Initial Decision* (FCC 84D-63, released September 4, 1984) (ALJ), which had found that the radio needs of Paradise outweighed those of North Las Vegas under a Section 307(b), 47 U.S.C. §307(b), issue and, therefore, had granted LVE's application, it being the sole applicant for Paradise. Instead, we concluded that none of the applicants was entitled to a §307(b) preference, and we resolved the case under the contingent standard comparative issue. Now before the Review Board is a petition for reconsideration of that *Decision*, filed April 22, 1985, by LVE. Carrigan filed an opposition on April 26, 1985.

2. Despite the fact that the contentions arrayed in the LVE petition are handsomely crafted and intelligently argued, all but one of these contentions — which we address below — were very thoroughly considered in our *Decision.*[1] Reconsideration will not be granted for reargument of points previously considered. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd*

[1] For example, its reargument that the Commission's 1983 *Suburban Community Policy*, 93 FCC 2d 436 (1983), *appeal pending sub nom. Beaufort County Broadcasting* v. *FCC*, No. 84-1384 (D.C. Cir.), vitiated the principles exemplified by *Huntington Broadcasting Co.*, 14 FCC 563, *rehearing denied*, 15 FCC 103 (1950), *aff'd*, 192 F.2d 33 (D.C. Cir. 1951). Our opinion explored, and rejected, that view, noting that the Commission has outstanding a rulemaking proposal to codify, in fact, the very principles articulated in *Huntington Broadcasting. See Decision* at para. 12, *citing Section 307(b) Preferences Within Metropolitan Areas* (MM Dkt. No. 83-403), FCC 83-160, released April 27, 1983, 48 Fed. Reg. 19428. LVE asserts that the Commission's "two year inaction on its own proposal in MM Docket No. 83-403" suggests that "the limited re-emergence of the *Huntington* principle would not govern the handful of pending ... cases." *See* LVE Petition at 17-18. But the Commission has recently briefed the court in two §307(b) cases, and nowhere does it imply in the slightest that the *Huntington Broadcasting* principles have been abandoned in the wake of the 1983 *Suburban Community Policy.* Indeed, both FCC briefs are at pains to explain those *Huntington* principles to the court. *See Decision* at para. 11 & n.18; *see also id.*, at para. 20 & n.44. Considering the centrality of *Huntington Broadcasting* to those two §307(b) cases, it is unthinkable that the Commission would not inform the court if its 1983 *Suburban Community Policy* had erased *Huntington Broadcasting.*

sub nom. Lorain Journal Co. v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

3. However, LVE does conduct our attention to a recent *Report and Order* (MM Docket No. 84-893), released March 28, 1985 (mimeo no. 3445), in which the Chief of the Policy and Rules Division of the Mass Media Bureau ("Division"), acting pursuant to delegated authority, decided that Paradise, Nevada was a "community" within the purport of 47 CFR §73.1120. Accordingly, that *Report and Order* assigned to Paradise a new UHF television channel, as well as a separate new TV channel to Las Vegas, Nevada. LVE insists that the Division's action reaffirms the community status of Paradise and "turns on its head the principle of *Cleveland Television Corporation*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *review denied*, FCC 83-235, released May 18, 1983, *aff'd sub nom. Cleveland Television Corporation* v. *FCC*, 732 F.2d 962, 55 RR 2d 1411 (D.C. Cir. 1984)."[2] We find that, for several reasons, the Division's March 1985 action is generally irrelevant to our *Decision*, and that LVE's petition must be denied.

4. We initially note that the Division's judgment that Paradise is a "community" separate and apart from greater Las Vegas is not accompanied by the searching analysis that ordinarily accompanies such findings. *Compare Report and Order*, at para. 6, *with, e.g., FM Channel Assignment* (North Naples, Florida), 41 RR 2d 1549 (1977); *FM Channel Assignment* (Vimville, Mississippi), 55 RR 2d 256 (1983).[3] The *Report and*

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[2] LVE Petition at 13. In *Cleveland Television*, the Board and the Commission found that, while Shaker Heights, Ohio had the attributes of a separate community within the customary FCC definition, that community was entitled to no §307(b) preference over the larger, contiguous city of Cleveland, as a comparative matter. *See* 91 FCC 2d at 1135-1137.

[3] In the North Naples case, the Broadcast Bureau (now Mass Media Bureau) refused to accord that city "community" status, although it was listed in the U.S. Census. 41 RR 2d at 1553. But, much like Paradise in the instant case, North Naples had no post office, no city hall, and no indigenous municipal services; in short, it had no separate identity. *See id.* In the more recent Vimville case, the Division refused to accord "community" status to a town which, much like Paradise, was unincorporated and had no separate self-government. 55 RR 2d at 257. Therein, the Division expounded its latest test for "community" status:

> we stated that the key ingredient in determining the existence of a community is the presence of a community of interest associated with an identifiable population grouping. We stated there that a mere geographical location is not enough, as there must be a population with needs that a station can address and that the principal test is whether the residents function as and conceive of themselves as a community around which their interests coalesce.

Id., at 258. By that standard, the "community" status of Paradise appears highly dubious; the objective evidence in our proceeding clearly demonstrated an identification only with Las Vegas, *e.g., Decision* at para. 16, a fact emphasized by LVE itself. *See id.*, at para. 17. However, as explained *infra* at para. 5, we do not here second-guess the Division's March 1985 *Report and Order.*

Order tersely states only two bases for its "community" determination: (1) Paradise is listed in the 1980 U.S. Census as an unincorporated entity, *id.*, at para. 6; and (2) the 1980 grant of LVE's prior request to reassign its station KNUU-AM from Las Vegas to Paradise so that KNUU-AM could upgrade from daytime-only status to fulltime as the first aural transmission service assigned to Paradise. *Id.* No further analysis is made. Yet, as the *Report and Order* correctly iterates, the mere listing in the U.S. Census as a "place" is not dispositive. *See id.*; *see also FM Channel Assignment* (North Naples), *supra.* And, insofar as the Division has constructed its *Report and Order* upon the 1980 reassignment of KNUU-AM to Paradise based on LVE's own prior request, its recent determination may be built — we fear — upon very faulty premises. For our *Decision* observed that LVE's specification of Paradise as a separate community (in order to avoid the impact of (former) 47 CFR §73.37(e) and to, thereby, acquire nighttime authority) for KNUU-AM might not have been made in the fullest good faith.[4] We also indicated that, at the time this agency granted LVE's previous request to specify Paradise as the "new" community of license for its Las Vegas-based KNUU-AM, "nobody apparently contested the 1980 KNUU-AM 'move' to Paradise, and we know not whether — with all due respect — the Commission had all of the facts developed in this record before it" at the time it permitted the reassignment. *Decision* at para. 19.[5] Again, we perceive that the Division's *Report and Order* (adopted March 11, 1985) preceded our *Decision* (released March 20, 1985), and we can only speculate as to whether the Division was aware of the evidentiary record anent Paradise compiled in this proceeding (or of LVE's lightspiritedness, *see supra* note 4), when it made its latest determination.

5. But we need not wallow in irresolution over this fascinating matter, because our *Decision, arguendo,* assumed that Paradise could be

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[4] We quoted LVE's general manager as supplying the background of its specification of Paradise as the new "community" for KNUU-AM:

> I was looking for a way to go 24 hours and I was driving down the strip one day and there's a sign that says, 'You're leaving Las Vegas and entering Paradise Town,' and I thought — I don't know. The bells got ringing. So, I took a picture of it and I said, 'Would you run this over to the Commission and ask them if I filed for Paradise, would it be approved.

Decision at para. 18. As they say in Las Vegas, ring-a-ding-ding.

[5] That is not to say that the Board did not earnestly consider the 1980 "move" of KNUU-AM to Paradise, or the tacit import of the Commission's prior grant to LVE. We expressly recognized that the "1980 grant is of more than routine significance" insofar as the question of whether Paradise is a cognizable "community," *Decision* at para. 18; but we further noted that not even LVE counsel would regard that 1980 reassignment action as more than "persuasive." *Id.*, at n.40.

considered a "community" pursuant to §73.1120. *See Decision* at para. 20. Still, we explained that the law holds that, even if "community" status is warranted, that status is by no means dispositive of the next and critical question of whether that "community" is entitled to a §307(b) preference. *See id.* Citing a consistent line of Commission cases,[6] we found that, under all of the circumstances presented to us, no rational §307(b) preference could be awarded to Paradise over Las Vegas. LVE has not even suggested in its petition why that result should change, *pace* its assertions that the *Huntington Broadcasting* doctrine has been temporarily suspended (*see supra* note 1) and that *Cleveland Television* has been "turned upside down" by the Policy and Rules Division's recent *Report and Order* relating to Paradise/Las Vegas.[7]

6. We think that LVE is in error here. It blithely disregards the expression of consistent policy reflected again in Dkt. No. 83-403; it wholly ignores the fact that the Commission continues to assert the *Huntington Broadcasting* doctrine as "good law" before the federal courts; and it apparently presumes that the Policy and Rules Division has the authority to overrule recent §307(b) decisions entered by the Commission. For all of the foregoing reasons, we find that reconsideration is neither necessary nor appropriate. We did not disqualify LVE on §307(b) grounds, *cf. Caldwell Broadcasting Corp.*, 57 RR 2d 1039 (Rev. Bd. 1985); it may be — to that degree — well ahead of the game.

7. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed April 22, 1985 by Las Vegas Electronics, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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[6] We there cited *Seven Locks Broadcasting*, 3 RR 2d 177 (1964); *Massillon Broadcasting Co., Inc.*, 2 RR 2d 409 (1964). We also quoted a recent FCC brief to the court in which this precise issue is squarely addressed. *Decision* at n.44 (and cases cited therein).

[7] If anything is here "turned upside down," it is the Commission's institutional hierarchy in the diffracted light of LVE. Moreover, no §307(b) choice of communities was required in the Division's latest *Report and Order*, since there were *two* TV channels available. *Cleveland Television* is, therefore, not at all analogous.

Financial Qualifications
Licensee, Qualifications
Satellite Domestic Communications
Transponder

Notice of Proposed Rulemaking adopted proposing rules to clarify requisite financial qualifications for domestic satellite licensees and requisite transponder fill for existing licensees seeking expansion satellites.

—*Domestic Fixed-Satellite Service*
CC Docket No. 85-135

FCC 85-238

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Licensing Space Stations in the Domestic Fixed-Satellite Service	CC Docket No. 85-135

NOTICE OF PROPOSED RULEMAKING

Adopted: May 3, 1985; Released: May 7, 1985

BY THE COMMISSION: COMMISSIONER RIVERA NOT PARTICIPATING.

I. Introduction

1. In its *1983 Processing Order*, the Commission established a cut-off for processing new domestic fixed-satellite space station applications.[1] Any space station application proposing the use of the 4/6 GHz and 12/14 GHz bands and requesting orbital locations usable by domestic satellites was required to be submitted on or before November 7, 1983 to be considered in this new processing group. Appendix B of this order specified the information required in these applications. In response, 21 entities submitted applications for 85 domestic satellite authorizations.

[1] *Domestic Fixed-Satellite Service*, 93 FCC 2d 1260 (1983). This order was released in conjunction with *Licensing of Space Stations in the Domestic Fixed-Satellite Service*, 54 Rad. Reg. 2d 577 (P&F) (1983) (hereinafter *Reduced Orbital Spacing*) and the individual orders granting the previous round of space station applications. The actual cut-off date was specified by *Public Notice*, Report No. DS-207 (released September 9, 1983).

Public notice was given on March 12, 1984 of the filing of these applications. Comments were solicited on the individual proposals as well as the general processing procedures for the group.[2] In addition to the applicants, 13 other parties submitted comments in this proceeding.[3]

2. It is clearly in the public interest to grant the applications of qualified entities in the pending group as expeditiously as possible. To this end, we have now completed a detailed review of the applications and of the extensive comments submitted in this proceeding. We are in accord with the commenters of the need to complete processing of the pending group as promptly as possible. We find that final authorizations are needed now if companies are to undertake the business commitments to construct the domestic satellite facilities needed to serve the public through the end of the decade.[4] Further delay would only cause uncertainty which could frustrate business planning to the detriment of users who will need satellite services in the late 1980's. We also believe that it is necessary to make such authorizations now to clarify future United States domestic satellite interests at the upcoming Space WARC.[5]

3. In contrast to previous situations when space stations were authorized, we are now faced with more applications than orbital locations available under current spacing criteria. A significant number of these applications appear to be speculative in that applicant either has not documented firm financial capabilities to construct the proposed satellite system or has requested the assignment of orbital locations in excess of its ability to use them efficiently to provide service to the public. On the other hand, other applications appear to satisfy fully our domestic satellite licensing objectives and merit prompt grant. We have considered all of the alternative processing methods suggested by the commenters. We have concluded that a strict application of qualifications standards will result in the most efficient and expeditious provision of additional domestic satellite services required by the public. We have restated these requirements to ensure that all applicants clearly understand them and have an opportunity to supplement their applications. The Commission then will be in a position to make a final ruling on the applications, and to dismiss those not meeting our criteria.[6] We are therefore proposing the

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[2] *Public Notice*, Report No. DS-265 (released March 12, 1984).

[3] A list of these parties is attached as Appendix A.

[4] In our 1983 authorization actions, we noted that the newly authorized satellites would be launched over a 4 to 5 year period. Because of the 3 year construction period required, satellites whose construction was authorized in 1985 would not be available until about 1988.

[5] Such considerations have been taken into account in other Commission proceedings. *See, e.g., Direct Broadcasting Satellite Service*, 90 FCC 2d 672 (1982).

[6] In the *1983 Processing Order*, 93 FCC 2d 1262, we indicated that applications not supplying the requisite information would be dismissed. In giving public notice of these

rules discussed herein which would require submission of certain additional information from applicants on an expedited basis, enabling us to assign orbital locations as quickly as possible.

II. Summary of Comments

4. The comments submitted in this proceeding suggest a variety of processing approaches. The following is a brief summary and discussion of these comments. Because of the volume of these pleadings, it is neither desirable nor practical to discuss each in detail. However, we have fully considered all of the comments and our decision to proceed with this rulemaking is based on our full evaluation of the record now before us.

5. It has been suggested that the Commission make a processing distinction between companies with authorized systems and those initially entering the domestic satellite market. Several entities applying for their initial authorizations have advocated a policy favoring new entrants.[7] They associate the benefits of competition and innovation with these applications and suggest that the applications of all qualified new entrants[8] be given expedited treatment.[9] Established carriers,[10] in contrast, have supported the institution of a renewal expectancy similar to that applied in the broadcast field. They argue that such an expectancy is necessary to protect substantial capital investment and unique customer requirements.

6. Several processing approaches have been suggested. These are comparative hearings, lotteries, auctions, or strict application of standards in order to dismiss unqualified applicants. The majority of commenters oppose comparative hearings because of their expense and tendency to delay proceedings. Some, however, suggested that after strict stan-

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applications, we reserved the right to dismiss any application if, upon further examination, we determined that it was defective or not in conformance with the Commission's rules, regulations or policies. *Public Notice*, Report No. DS-265 (released March 12, 1984).

[7] National Exchange, Inc. (NEX), Equatorial Communication Services(Equatorial), Ford Aerospace Satellite Service Corporation (Ford), Federal Express Corporation (Federal Express).

[8] NEX suggests focusing on spectrum efficiency as a method to evaluate new entrants.

[9] We reject a motion filed by Ford, a potential new entrant, for expedited processing of its applications. The processing procedure established by our *1983 Processing Order* is intended to establish a fair and orderly means of authorizing new domestic facilities. We have consistently applied a group approach to processing applications as particular frequency bands become intensively used. We have found this to be the most practical way of authorizing multiple entities in order to provide service to the public as expeditiously as possible. Bifurcation, with some applicants processed and either authorized or dismissed before others, will only lead to business uncertainties and delays in service.

[10] Satellite Business Systems (SBS), GTE Satellite Corporation (GSAT), and GTE Spacenet Corporation (Spacenet). The Western Union Telegraph Company (Western Union) suggests a permanent award of an authorization to be revoked only for good cause.

dards were applied to all applicants in order to dismiss those not meeting our criteria, hearings would be appropriate to determine awards to qualified applicants.[11]

7. Parties were concerned that the establishment of a lottery to distribute orbital locations would necessitate major design modifications for applicants awarded a position adjacent to a non-compatible system.[12] In addition, concern was expressed that if all applicants were included in a lottery, there was a substantial possibility of an award to an unqualified company.[13] Other applicants prefer a lottery to comparative hearings because of the higher costs, delays and administrative difficulties caused by the latter method.[14]

8. The possibility of auctioning orbital locations was discussed in some comments. The Bureaus of Economics, Consumer Protection and Competition of the Federal Trade Commission (FTC) advocated this approach based on economic analysis and the assertion that administrative costs would be lower than if a lottery were used.[15] Other parties favored a limited auction for authorizations to existing carriers as opposed to new entrants.[16]

9. The majority of the commenters favored a strict application of the standards set out in the *1983 Processing Order* to eliminate unqualified applicants.[17] The parties asserted that if this approach were followed there would be sufficient orbital positions to accommodate the remaining applications.[18] These standards were discussed by the commenters and included financial,[19] legal and technical criteria.[20] In addition, parties

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[11] SBS; *see* Comments of Ford which favor of expedited paper hearings for existing carriers with firm customer needs.

[12] Spacenet; GSAT.

[13] Equatorial, Spacenet.

[14] Comments submitted by Western Union outline possible procedures by which such a lottery could be conducted. *In accord*, see comments of Hughes.

[15] *In accord*, comments filed by Henry Geller and Donna Lampert. Another applicant supporting the use of an auction if unqualified applicants were not included was Hughes Communications Galaxy, Inc. (Hughes).

[16] Equatorial stated that an auction for all applicants would pose a substantial entry barrier to the market.

[17] 93 FCC 2d at 1262.

[18] *See, e.g.*, Hughes, Ford, GSAT, Spacenet, Comsat General Corporation (Comsat), Equatorial.

[19] Systematics General Corporation (SGC) does suggest that its bifurcated processing procedure based on requested orbital locations would permit immediate grants to new entrants. Strict construction deadlines could be applied to monitor these companies' financial qualifications and progress in completion of satellite systems. Digital Telesat, Inc. (Digisat) states in a Consolidated Opposition to Petition to Deny that an applicant should only be required to demonstrate a reasonable assurance of obtaining financing after a construction permit is awarded. Other parties advocated that a strict financial qualifications standard be applied to all applicants. *See* American Satellite Company

asserted that the Commission should adhere to its policy of awarding two positions to each qualified new entrant and additional locations for non-replacement satellites to existing carriers only where substantial fill and firm customer need were demonstrated.[21]

10. Other possibilities such as expansion of the orbital arc[22] and further reductions in satellite spacings were raised.[23] It was suggested that combinations between applicants be favored.[24] In addition, Systematics General Corporation (SGC) suggested a bifurcated processing procedure which would expeditiously grant those applications requesting positions in the far eastern portion of the orbital arc.[25] Other parties suggested the requirement of due diligence bench marks to insure the timely utilization of all authorizations.[26]

(American Satellite) which offered detailed suggestions on the requirements to demonstrate financial qualifications for both new and existing carriers.

[20] For example, Hughes suggested deferring action on hybrid satellites as being inherently inefficient.

[21] American Satellite suggested deferring applications for late launches and denial of requests for contiguous positions.

[22] GSAT, Spacenet.

[23] Parties did not advocate further reduction in spacings although Hughes stated that separations could be slightly narrowed without reducing spacing below 2°. Hughes opposes a reduction below 3° between those satellites serving the cable television industry. Home Box Office (HBO) and the Satellite Television Industry Association (SPACE) requested that spacings between cable satellites be left at 3° and Joint Comments of Cable Television Operators and National Cable Television Association stressed that the move to 2° spacing be made slowly. CBS urged rejection of HBO's proposal. GTE Spacenet suggested that authority be given to fixed-satellite permittees to use frequencies allocated to DBS service. This suggestion was opposed by Satellite Television Corp.

[24] Hughes, Federal Express.

[25] A subsequently filed joint motion of Cablesat General Corporation (Cablesat), Columbia Communications Corporation (Columbia), Digisat and SGC urges that we bifurcate this application proceeding and promptly grant their applications proposing Far Eastern Regional Networks (FERN), *i.e.*, a satellite network using positions east of 55° W.L. FERN applicants argue that their applications are not mutually exclusive with other applicants seeking to provide 48 and 50-state services, because these types of services can be provided only from locations west of 55° W.L. Because all requests for locations east of 55° W.L. can be accommodated, FERN applicants argue that these requests should be immediately granted. GTE Spacenet, Federal Express and RCA Americom, oppose this procedure, contending that FERN locations may be able to be used by non-FERN applicants willing to change their business plans. ISI alleges that its requested orbit assignment will receive unacceptable interference from Digisat. We deny the FERN applicants' motion. Because the orbital locations east of 55° W.L. are usable for domestic satellite services, we do not wish to foreclose non-FERN applicants from the option of modifying their plans. Moreover, we will not, as the FERN applicants suggest, dispense with an independent assessment of FERN applicants' qualifications to the detriment of qualified applicants who may be willing to accept a position east of 55° W.L.

[26] Western Union.

III. Discussion

11. It has been more than a decade since we first established our basic domestic satellite licensing policies.[27] They have served the public well and continue to be flexible enough to allow us to respond promptly to changing technological, market and regulatory conditions.[28] Three groups of domestic satellite authorizations have been granted within this policy framework. The initial domestic satellite authorizations were issued in 1973,[29] another group was authorized in 1980,[30] and our most recent authorization actions were taken in 1983.[31] In considering the current group of domestic satellite applications now before us, we will continue to pursue our long-standing objective as announced in our order in *Domsat II*, 35 FCC 2d 844 (1972), to allow qualified applicants the opportunity to demonstrate the advantages to the public derived from satellite communications. As we cautioned in that order, however, entry into this field is not without limitation and we have a statutory responsibility to set qualification standards. Each applicant must make a sufficient showing that it meets these qualifications and that its proposal will sufficiently benefit the public to justify the assignment of orbital locations.

12. We find that the public interest will be best served by an expeditious grant of authorizations to those qualified applicants who will be able to begin construction of their systems immediately and thus offer satellite services to the public expeditiously.[32] In making this determination, we are fulfilling our legislative mandate to satisfy the public

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[27] *Domestic Communications Satellite Facilities*, 22 FCC 2d 86 (1970), 35 FCC 2d 844 (1972), *recon. in part*, 38 FCC 2d 665 (1972). *Domsat I, II,* and *III,* respectively).

[28] *Domestic Fixed-Satellite Service*, 88 FCC 2d 318 (1981).

[29] *American Satellite Corporation*, 43 FCC 2d 348 (1973); *American Telephone And Telegraph Company*, 42 FCC 2d 654 (1973); *Communications Satellite Corp.*, 42 FCC 2d 677 (1973); *GTE Satellite Corporation*, 43 FCC 2d 1141 (1973); *RCA Global Communications*, 42 FCC 2d 774 (1973); *Western Union Telegraph Company*, 38 FCC 2d 1197 (1973).

[30] *Comsat General Corporation*, 84 FCC 2d 547 (1981); *GTE Satellite Corporation*, 84 FCC 2d 562 (1981); *Hughes Communications, Inc.*, 84 FCC 2d 578 (1981); *RCA American Communications, Inc.*, 84 FCC 2d 633 (1981); *Satellite Business Systems*, 86 FCC 2d 180 (1981); *Southern Pacific Communications*, 84 FCC 2d 650 (1981); *Western Union Telegraph Co.*, 86 FCC 2d 196 (1981).

[31] *Advanced Business Communications, Inc.*, 94 FCC 2d 1 (1983); *American Satellite Co.*, 94 FCC 2d 39 (1983); *American Telephone and Telegraph Co.*, 94 FCC 2d 44 (1983); *Hughes Communications, Inc.*, 94 FCC 2d 271 (1983); *Rainbow Satellite, Inc.*, 94 FCC 2d 437 (1983); *RCA American Communications, Inc.*, 94 FCC 2d 441 (1983); *Satellite Business Systems*, 94 FCC 2d 447 (1983); *Southern Pacific Communications Company*, 94 FCC 2d 457 (1983); *United States Satellite Systems, Inc.*, 94 FCC 2d 462 (1983); *Western Union Telegraph Co.*, 94 FCC 2d 467 (1983).

[32] The desirability of expeditious action in the domestic satellite field and avoidance of unnecessary administrative delays in this dynamic industry is well established. *See e.g., U.S. v. FCC*, 652 F.2d 72 (D.C. Cir. 1980).

"convenience, interest, or necessity"[33] and an integral part of our public interest conclusion is verifying the qualifications of individual applicants.[34] The explicit licensing standards we are articulating herein constitute the most efficient and reasonable method to judge an applicant's qualifications to proceed expeditiously with the construction, launch and operation of the proposed satellite facilities.[35]

13. Although it has been suggested that either lotteries or auctions are appropriate processing procedures, we have determined that the adoption of either at this time would be premature and could raise substantial problems. Instead, the application of strict qualifications standards might avoid the need to select alternative approaches and therefore, is preferable. As has been pointed out by the parties opposing lotteries, a pool including all applicants probably would result in awarding satellite authorizations to unqualified entities thus causing delays in construction and service, and perhaps even forfeiture of licenses awarded to companies unable to fulfill their application representations. In addition, utilization of a lottery could result in the award of contiguous locations to incompatible systems thus necessitating major design modifications for licensees. In addition, the administrative delays and costs which would result from the institution of a new licensing scheme, such as a lottery, assuming the statutory requirements for using a lottery could be met,[36] militate against its use.

14. Auctions would entail many of the same administrative problems associated with lotteries. In addition, auctions have been proposed as a method for awarding authorizations in other services but have not been employed.[37] Thus, we have no experience by which to evaluate their efficacy in this service. We have concluded that with the assistance of the information requested by the proposed rule, the best approach is to determine expeditiously which applicants meet our strict qualifications. If there are more qualified applicants than we are able to accommodate, we

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[33] 47 U.S.C. § 307(a).

[34] *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

[35] *See* 47 U.S.C. § 308(b); *see also Domestic Fixed-Satellite Service*, 77 FCC 2d 956 (1980) (hereinafter *1980 Processing Order*); *1983 Processing Order*, 93 FCC 2d 1260.

[36] The criteria the Commission must meet in employing lotteries is set forth in H.R. Rep. No. 97-765, 97th Cong., 2d Sess. (1982).

[37] *See, e.g., In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203, 1260 (1983); *In the Matter of Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries instead of Comparative Hearings*, 93 FCC 2d 952, 998 (1983). In these proceedings the Commission concluded that the specific grant of authority to use lotteries made that processing method more attractive than auctions.

may then need to reexamine these alternatives. The following is a discussion of our proposed rule.

IV. Space Station Licensing Standards

15. The basic information required of each applicant is specified in the *1983 Processing Order*.[38] Applicants were required to file complete and comprehensive proposals for their systems and services, and to demonstrate specifically their ability to proceed promptly with construction and launch of the proposed satellites. Additionally, if more than two orbital locations are requested, applicants were required to submit information on utilization of transponder capacity on in-orbit satellites and firm customer service requirements for additional satellite capacity. Our initial review of the pending applications indicates the information concerning financial qualifications is, in many cases, inadequate to demonstrate an applicant's ability to construct and launch the proposed system promptly. Information with respect to transponder loading is insufficient to demonstrate a need for requested expansion satellites, or of future user requirements.

16. Section 308 of the Communications Act of 1934 authorizes the Commission to grant radio station licenses and Section 309(e) provides that if the Commission is unable to make a finding that the public interest, convenience and necessity will be served by granting that application, it "shall formally designate the application for hearing."[39] However, if an application on its face violates a Commission rule, a full hearing is not required. The hearing requirement does not affect the Commission's rulemaking authority.[40] In the *Storer* case, a pending application was dismissed upon the Commission's adoption of multiple ownership rules for broadcast stations because the applicant was already licensed to operate the maximum number of stations permitted. The Court declared that the application could be dismissed without a hearing. Specifically, the Court held: "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing."[41] Thus, if applicants in the current domestic satellite system processing group are unable to meet the explicit basic qualifying standards concerning financial qualifications and loading requirements, their applications may be dismissed without a hearing.

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[38] 93 FCC 2d 1260 (1983). The information specified in this order is designed to update the information that has been required of space station applicants since our initial decision in 1970 to accept such applications. *See Domsat I*, 22 FCC 2d 86, at Appendix D, *1980 Processing Order*, 77 FCC 2d 956, at Appendix B.

[39] 47 U.S.C. §§ 308, 309(e).

[40] *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

[41] *Id.* at 205.

A. Financial Qualifications

17. Financial qualifications are required in the domestic satellite field to ensure that the development of the available but unused orbit and spectrum resource is not delayed, and that the public is promptly provided with needed satellite service. Constructing and operating a satellite system requires an enormous capital investment[42] with large risks involved. Close scrutiny of an applicant's financial qualifications assures the Commission that an applicant can immediately begin to construct and operate its system. Without sufficient financial resources at the time a construction permit is granted, an applicant will spend a significant amount of time attempting to raise capital before even beginning to fulfill its representations to the Commission that it can begin constructing its system immediately. Furthermore, experience has demonstrated that there is no guarantee that financing attempts will prove successful even with the issuance of a construction permit by the Commission. In fact, the failure of licensees holding conditional authorizations to obtain financing has resulted in protracted proceedings, placed substantial burdens on other applicants and on our limited processing staff, and delayed the processing of applications for additional facilities. Moreover, grant of an authorization to an applicant who is not financially qualified is now likely to preclude qualified applicants from constructing and operating proposed systems. This, in turn, delays service to the public. Requiring that an applicant demonstrate that it is financially qualified also discourages the filing of purely speculative applications for the purpose of selling a bare license and privately profiting from the regulatory process.

18. Thus, the Commission has, since *Domsat I*, traditionally required all applicants to demonstrate that they are financially qualified to construct, launch and operate their proposed systems promptly.[43] This scrutiny ensures that an applicant is capable of implementing its proposed domestic fixed-satellite system promptly. To aid our assessment, we stated in *Reduced Orbital Spacing* that we believed the standards set forth in *Ultravision*[44] were indicative of the showing that must be made by domestic satellite applicants to demonstrate full financial qualifications.[45]

19. Most parties commenting on this issue affirmatively support close scrutiny of basic financial qualifications. Ford, for example, declares that the Commission should adhere to its statement that it would hold domestic satellite applicants to the *Ultravision* standard for demonstrating full

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[42] The investment cost for a satellite system averages about $300 million.

[43] 22 FCC 2d 844.

[44] *Ultravision Broadcasting*, 1 FCC 2d 544 (1965). That standard basically provides that an applicant must have sufficient capital to construct its system and operate if for one year.

[45] 94 FCC 2d at n. 59.

financial qualifications.[46] According to Ford, applications unable to meet this standard should be summarily dismissed. SBS asserts that financial qualifications should include unconditional commitments of sufficient funds to build, launch and operate the proposed systems upon authorization. Many parties, including SBS, American Satellite, and Equatorial, oppose any further grant of conditional construction permits such as the ones issued on an experimental basis to three applicants in the previous processing group.[47] SBS points out that the current conditions of scarcity require a more rigorous policy in regard to applicants' qualifications. USSSI states that while it believes that there is some confusion regarding the prevailing standard, the Ultravision "reasonable assurance" test, coupled with a waiver for applicants unable to meet this test, is the prevailing Commission view. SGC is one of the few parties to continue to support the conditional authorizations, at least in the context of FERN applicants, where SGC appears to argue for immediate grant of system authorizations, together with a strict six month deadline for initiating construction. Some applicants, such as Columbia and Rainbow, argue that the Direct Broadcast Satellite "due diligence" standard should apply. For reasons discussed in more detail below, we believe that adopting a less stringent standard would be counterproductive. Our experiment with more lenient treatment of applicant qualifications may have been appropriate when the number of competitors was small and it was possible to afford the opportunity to all applicants to pursue their planned systems. Today, however, this is no longer the case.

20. None of the comments in this proceeding convinces us that a lesser standard than *Ultravision* is warranted under current conditions in the 4/6 GHz and 12/14 GHz bands. We believe that only the strictest application of the *Ultravision* standard will allow us to fulfill our regulatory responsibilities and further our long-standing domestic satellite policy objectives.[48] The *Ultravision* test requires that an applicant demonstrate that it has sufficient capital to construct its system and operate it for one year. Until 1983, the documentation of the financial qualifications of applicants was not closely scrutinized because either the applicants' financial resources were a matter of record before the Commission or the applicant clearly had sufficient corporate resources to finance their proposed systems. However, in 1983, three of the pending applicants admittedly did not have the financial resources to construct and operate

[46] *See* Consolidated Petitions to Deny or Dismiss and Comments of Ford at 30. Other applicants supporting the full demonstration of financial qualifications include GTE Satellite, GTE Spacenet, American Satellite, Martin Marietta Communications Systems, Inc. (Martin Marietta) and SBS.

[47] *See* para. 20 *infra* for a discussion of this approach.

[48] *See Domsat II*, 35 FCC 2d 844 (1972).

their proposed satellite systems. Rather, they claimed that financial institutions with whom they had been in negotiations were prepared to participate in financing the proposed systems once construction permits were granted. Because we were able to grant all applications without delaying any qualified applicant from proceeding with its plans, we were able to try a novel approach for that group, and granted three applicants authorizations conditioned upon their obtaining the necessary financing.[49] We believe, however, that this experiment was not successful.[50] None of the three applicants could arrange conventional financing promptly upon grant, as they had represented they would, nor could any obtain the committed non-contingent financing we would have required under a more traditional approach. Given the existence of applicants who appear to be capable of demonstrating full financial qualifications prior to the issuance of construction permits, the public interest will not be served by repeating this unsuccessful experiment.

21. Based on our extensive experience with the financial qualifications of domestic satellite applicants, and the observations that we have received from the parties in response to our request for comments on processing methods and individual applications, we believe it desirable to restate and clarify the financial qualification requirements we stated would apply to future space station applicants in *Reduced Orbital Spacing*. Specifically, we propose that each applicant for a domestic satellite space station authorization unequivocally demonstrate, prior to grant, that it has firmly committed financial resources to meet the estimated costs of proposed construction, launch and other initial expenses, as well as the estimated operating expenses for a year. Applicants must demonstrate financial qualifications by submitting audited financial statements or balance sheets for the latest available year demonstrating that the applicant or its parent company, if it is relying on the parent company as a source of financing, has uncommitted current assets sufficient to cover estimated investment costs and the estimated costs of the initial year of operation. Proof must also be submitted that such funds are firmly committed to provide all capital expenditures with respect to the proposed domestic satellite project.[51] This documentation need not be resubmitted if it has already been supplied in the November 7, 1983 application and the applicant certifies that circumstances have not

[49] *Advanced Business Communications, Inc.*, 94 FCC 2d 1 (1983); *Rainbow Satellite Inc.*, 94 FCC 2d 437 (1983); *United States Satellite Systems, Inc.*, 94 FCC 2d 462 (1983).

[50] *Advanced Business Communications, Inc.*, FCC 85-57 (released February 27, 1985); *Rainbow Satellite, Inc.*, Mimeo No. 2583 (released February 14, 1985); *United States Satellite Systems, Inc.*, Mimeo No. 2584 (released February 14, 1985). (Applications for review pending).

[51] For example, a resolution of the Board of Directors was considered sufficient for this purpose in *RCA Global Communications*, FCC 73-795 (released July 27, 1973).

changed. In conjunction with any form of credit arrangement or private equity placement the applicant is relying on to cover initial investment and operating costs, it must also submit the details of the loan or other form of credit or equity arrangement intended to be used to finance the proposed system. This includes information such as the identity of the creditor (or creditors), letters of commitment, all terms of the transactions including required collateral, and the details of any sale or placement of any equity or other form of ownership interest.

22. Acceptable financial arrangements must demonstrate that financing has been approved and does not rest on contingencies which require further action by either party to the loan.[52] In other words, the instrument of financing must demonstrate that the lender has already determined that the applicant is creditworthy and, absent changed circumstances, is prepared to make the loan immediately on grant of Commission authorization to construct the satellite system.[53] Thus, letters from a financier indicating that it has an interest in the project, or will assist in arranging financing once a construction permit is granted, are not sufficient to demonstrate financial qualifications. Loans contingent on a future action of the applicant, such as marketing a certain number of transponders on the system or entering into contracts with other parties, will also not be considered sufficient. Parties are referred to our discussions in the cases cited in footnote 50 as examples of inadequate financial arrangements. An exact text of the proposed rule is contained in Appendix B.[54]

B. Transponder Loading Requirements

23. Newly authorized systems relying on generalized projections of traffic have consistently been assigned two orbital locations.[55] This policy rests on the basis that two locations are necessary and sufficient to

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[52] In particular, applicants with insufficient current capital assets committed to meet the test specified above may rely on project financing only if all necessary contracts have been executed. Reliance on anticipated future transponder sales or lease contracts will not be considered sufficient to demonstrate the applicant's financial ability to meet payments required by the spacecraft manufacturer, launch services provider, and other vendors.

[53] The only circumstances we can foresee as an acceptable limitation on a lender's commitment to make a loan is a change in the applicant's creditworthiness or in general market conditions, *e.g.*, soaring interest rates.

[54] We have attempted here to define precisely the showing an applicant must make to demonstrate its existing financial qualifications to construct and operate its proposed satellite system. Parties are on notice that our intent is to interpret the *Ultravision* standard in a manner that, while not impossible to meet, is more stringent than the interpretation applied in some of the cases that followed *Ultravision*. Thus, to the extent that the standard proposed in the discussion above is inconsistent with these cases, our proposed standard will be followed.

[55] *See 1983 Processing Order*, 93 FCC 2d 1260 (1983); *Domestic Fixed-Satellite Service - Orbit Deployment Plan*, 84 FCC 2d 584 (1981) (hereinafter *1980 Assignment Order*).

establish a competitive market presence in the absence of firm customer commitments. When an existing operator seeks to expand an authorized system or a new entrant requests more than two orbit locations, however, a concrete showing of need must be made. In *Reduced Orbital Spacing*,[56] citing the *1980 Assignment Order*,[57] we stated that additional locations would be assigned "only upon a showing that in-orbit satellites are essentially filled and that an additional orbit location is needed to satisfy firm customer growth requirements, including reasonable protection requirements."[58] The upper limit on in-orbit spare capacity was set at the equivalent of one spare satellite used for occasional or preemptible services, although we stated that a lower level may be required to enable more satellites to be accommodated. We further stated that forecasted requirements should be related as specifically as possible to the applicant's experience, rather than to general industry forecasts. Thus, applicants requesting more than two locations were required to provide detailed historical use data for their system and projected requirements on a transponder-by-transponder basis.

24. Parties commenting on the general policies that should be followed in authorizing expansion satellites agree that new entrants should continue to be provided two orbital locations. They also agree that warehousing orbital assignments should not be permitted, although they differ in the method proposed to limit the number of expansion satellites granted. Equatorial and NEX argue that capacity of existing locations be utilized to the fullest extent possible and firm customer requirements be demonstrated before additional satellites are authorized. Federal Express argues that existing operators should be limited to the use of locations currently authorized to them until the existing satellites have been replaced with higher capacity satellites and maximum feasible capacity is being used. GSAT and Spacenet believe that expansion should be limited to one assignment in each band, while Martin Marietta asserts that existing operators should be limited to one new orbital assignment upon showing that existing facilities are loaded. SGC argues that assignment of more than one position in each frequency band is unnecessary until an applicant can certify it has binding contracts for non-occasional use of at least 50% of the transponders on a satellite at that location. Finally, American Satellite suggests that no operator should be permitted to obtain more than 25% in-orbit spare capacity in a frequency band.

25. We agree that qualified new entrants in each pair of frequency bands should continue to be initially assigned up to two orbital locations in each band. Further, we agree that requests for additional capacity should

[56] 54 Rad. Reg. 2d 577.

[57] 84 FCC 2d 584.

[58] *Reduced Orbital Spacing*, 54 Rad. Reg. 2d at para. 81.

be concretely justified and the warehousing of expansion locations prohibited. Requiring licensees to operate their facilities at the maximum feasible capacity will achieve more efficient utilization of the orbit-spectrum resource to the benefit of the using public. Thus, we believe that our traditional policy of authorizing additional locations only when existing satellites are essentially filled and firm customer growth requirements are demonstrated should continue to be applied with certain modifications to facilitate implementation and to recognize that future growth requirements are impossible to predict with absolute certainty.

26. Thus, we propose that applicants requesting an expansion satellite be required to demonstrate that the additional satellite will be 80% filled within three years of launch. This will provide sufficient spare capacity to insure against transponder failure, while maximizing orbit-spectrum use. If no contracts for the additional in-orbit capacity have been executed, the 80% showing may be made by projecting historical customer growth rates for the applicant's existing in-orbit system, taking transponder configuration into account.[59] General industry forecasts will not be sufficient to demonstrate that the additional satellite will achieve the requisite fill. In addition, because transponder sales and long-term leases cannot be projected in the same manner as an applicant's own transponder requirements to serve customers directly, these transactions may not be included in projections of future fill.[60] We believe that this approach, in contrast to limiting artificially the number of expansion satellites that may be granted as several commenters suggest, will ensure that demand for domestic satellite services is being satisfied.

27. We recognize, however, that it is often difficult to project firm customer requirements years in advance of launch, especially when an applicant's in-orbit system is not yet, or has only recently, become operational. Thus, we propose that applicants not able to demonstrate that the additional satellite will be at least 80% filled nevertheless be provided with the opportunity for expansion at its own risk. This opportunity will

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[59] Submitting this information should not pose any problems to pending applicants. Historical use data and usage projections were already required to be submitted under Appendix B of the *1983 Processing Order*. We propose that traffic be based on linear extrapolation of the past three years usage taken from the semi-annual transponder loading reports required to be filed with the Commission employing a simple least squares regression model.

[60] Transponder sales are a recent development in domestic satellite marketing, *see Transponder Sales Order*, 90 FCC 2d 1238 (1982), and caution must therefore be applied in extrapolating the initial rate of transponder sales, which may not be reflective of the longer term trend. Because of the highly customized nature of sales and long-term leases, we believe such transactions should be considered as contributing to fill only when contracts have been executed firmly committing purchasers to pay for and use them. Moreover, transponder purchasers and lessees do not report the actual usage data that is necessary to predict future requirements accurately.

be limited to one expansion satellite in each frequency band in which the applicant is authorized to operate. However, to ensure that these grants do not prevent our authorization of a qualified new entrant or of a demonstrably filled expansion satellite, these authorizations will be conditioned upon the permittee demonstrating prior to launch of the satellite that its existing in-orbit system in that frequency band is 80% filled.[61] This should prevent a satellite not actually needed from being launched and thus inefficiently occupying an orbital location. Failure to make this required demonstration of fill by the specified launch date will render the authorization null and void.

28. In addition, to ensure that in-orbit satellites are being adequately utilized, we propose to require each licensee to maintain 80% fill. This fill requirement must be demonstrated on each satellite, or if circumstances warrant, on an average basis over the system. As we noted in *Reduced Orbital Spacing*, if the required traffic fill is not achieved, the unfilled satellite will be considered as an excess spare.[62] This spare assignment will be cancelled and colocation of in-orbit satellites required if pending applications of qualified new entrants or existing entrants concretely demonstrating that an additional satellite will be 80% filled are ready for grant. If an assignment is cancelled, the licensee will be afforded thirty days to notify the Commission which of its assigned locations should be cancelled. Further, as we have done in the past, we will also condition any grant to require construction, launch and operation of the space station by certain dates.[63] Failure to meet these milestones by the specified dates will render the orbital assignment null and void. In this way, we seek to ensure further that orbit locations are not warehoused. An exact text of our proposed rule is contained in Appendix B.

C. Filing Dates

29. The major objective of this proceeding is to state as clearly as possible the information required to be included in an application for a satellite space station authorization with respect to financial qualifications and transponder loading. Although some of the pending applications may include sufficient detail with respect to these requirements, we are giving applicants the opportunity to amend their filings in order that they might demonstrate compliance with the proposed standards. Because it is necessary to act expeditiously on these pending applications, we are requiring any supplements to applications or certifications of continued

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[61] This demonstration may be made by referencing the transponder utilization reports required to be filed with the Commission semi-annually or by submitting a separate document.

[62] *Reduced Orbital Spacing*, 54 Rad. Reg. 2d, at para. 84.

[63] *Id.* at para. 82.

financial qualifications[64] filed in compliance with the rules proposed herein to be filed within the time period designated for comments as specified below. The extensive comments received in this matter have already provided a full opportunity for all parties to be heard. In light of that, and the need for prompt action, we believe that any further delay would disserve the public interest.[65] Thus, no extensions of time will be granted for the submissions specified in this notice.

V. Conclusion

30. Authority for this proposed rulemaking is contained in Sections 1, 4(i) and (j), 301, 303, 307(a), 308(b), 309 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 301, 303, 307(a), 308(b), 309 and 403.

31. Pursuant to Section 605(b) of the Regulatory Flexibility Act, we certify that our proposed rule will not have a significant impact on a substantial number of small entities. We believe this finding is compelled by the large amounts of financial resources which an entity must possess in order to construct and launch a domestic satellite system.[66]

32. Because it appears that the pending applications considered herein may be mutually exclusive on grounds of electrical interference, the processing of these applications and this rulemaking proceeding is considered to be a restricted adjudicative proceeding. *See* 47 C.F.R. § 1.1203. Accordingly, the restrictions on *ex parte* communications in Section 1.1223 of the rules and regulations, 47 C.F.R. § 1.1223, apply to these matters with respect to the use of orbital locations and the frequency bands 3700-4200 MHz, 5925-6425 MHz, 11,700-12,200 MHz and 14,000-14,500 MHz. Specifically, all *ex parte* contacts are prohibited with respect to these proposals. An *ex parte* contact is a message (spoken or written) concerning the merits or outcome of any aspect of this proceeding made to a Commissioner, a Commissioner's assistant or other decision-making staff member, other than comments officially filed at the Commission or oral presentations made with an opportunity for all parties to be present.

33. Accordingly, IT IS ORDERED that interested parties may file comments according to an expedited schedule pursuant to Section 1.415 of the Commission's rules on or before June 7, 1985 and reply comments on or before June 27, 1985. Any supplemental information must be filed in

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[64] *See* para. 21 *supra.*

[65] *See NAB v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984). The factors identified in that decision to support concurrent consideration of applications and rulemaking issues are also present here. In this regard, we note that specific U.S. satellite interests will be integral to the United States' negotiating position at the 1985 Space WARC, which convenes August 8, 1985.

[66] *See* para. 17 *supra.*

conjunction with this comment period and must be received on or before June 7, 1985. Comments on supplemental information must be filed on or before June 27, 1985, and reply comments on or before July 8, 1985. In addition to consideration of all relevant and timely comments, the Commission may take into consideration information not contained in the comments provided that evidence of the existence of such information including its nature and sources is placed in the public record and provided that the fact of the Commission reliance in such information is noted in any order taking final action in this matter.

34. IT IS FURTHER ORDERED that pursuant to Section 1.419 of the Commission's rules, an original and five copies of all comments, replies, pleadings, briefs or other documents shall be filed with the Commission, and served directly on the parties listed in Appendix A. Copies of all filings will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

35. IT IS FURTHER ORDERED that the Chief, Common Carrier Bureau, has delegated authority to require the submission of additional information, make further inquiries and modify the dates and procedures if necessary to provide for a fuller record and more efficient proceeding.

36. IT IS FURTHER ORDERED that, in addition to the publication of this *Notice of Proposed Rulemaking* in the Federal Register, the Secretary shall also cause a copy of this notice to be served by certified mail upon each of the parties listed in Appendix A immediately upon the release of this notice.

37. IT IS FURTHER ORDERED that the Secretary shall cause a copy of this *Notice of Proposed Rulemaking* to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. § 605(b).

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix A- may be seen in FCC Dockets Branch, 1919 M Street N.W., Washington, D.C.

APPENDIX B

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 25) is amended as follows:

§ 25.202(d) frequencies, frequency tolerance and emission limitation is proposed to be revised:

* * * * *

(d) Orbital locations assigned to space stations licensed under this part by the Commission are subject to change by summary order of the Commission on 30 days notice. An authorization to construct and/or to launch a space station becomes null and void if the construction is not begun or is not completed, or if the space station is not launched and positioned at its assigned orbital location and operations commenced in accordance with the station authorization, by the respective date(s) specified in the authorization. Frequencies and orbital location assignments are subject to the policies and procedures set forth in the Report and Order, FCC 83-184, adopted April 27, 1983 in CC Docket No. 81-704, and the licensees of such space stations shall comply with the requirements set forth in that decision.

* * * * *

A new Section 25.391 is proposed to be added as follows:

Section 25.391 Qualifications of Domestic Satellite Space Station Licensees

(a) Radio station applications for new domestic fixed-satellites shall comply with the requirements established in Report and Order in CC Docket No. 81-704. Applications will be unacceptable for filing and will be returned to the applicant if (1) the application is defective with respect to completeness of information, execution, or other matters of a formal matter; or (2) the application does not substantially comply with the Commission's rules, regulations, specific requests for information, or other requirements, such as those specified in the Report and Order in CC Docket No. 81-704.

(b) Each applicant for a space station authorization in the domestic Fixed-Satellite Service must demonstrate, on the basis of the documentation contained in its application, that it is legally, financially, technically, and otherwise qualified to proceed expeditiously with the construction, launch and/or operation of each proposed space station facility immediately upon grant of the requested authorization in the form specified below. Failure to make such a showing shall result in the dismissal of the application.

(c) Each application for authority to construct and/or to launch and operate a space station in this service shall include a detailed statement of estimated investment and operating costs for the expected lifetime of the facility, and shall demonstrate in accordance with paragraph (d) of this section the applicant's current financial ability to meet the:

(1) Estimated costs of proposed construction and/or launch, and any other initial expenses for the space station(s); and

(2) Estimated operating expenses for one year after launch of the proposed space station(s).

(d) Except as provided in paragraph (e) of this section, each application for authority to construct and/or launch a space station shall demonstrate an applicant's current financial ability to meet the costs specified paragraph (c) of this section by submitting the following financial information verified by affidavit:

(1) A balance sheet current within ninety (90) days of the date of the application or any amendment and copies of any financial commitments reflected in the balance sheet (such as, for example, loan agreements and service contracts) together with an exhibit demonstrating that the applicant has uncommitted capital assets, sufficient to satisfy the requirements of paragraph (c) of this section, together with an explicit commitment by management that these assets will be used for the proposed satellite program; and

(2) If the submissions of paragraph (d)(1) of this section do not satisfy paragraph (c) of this section, the applicant shall submit additional information, for the period of proposed construction plus an initial year of operation, by a statement of committed non-contingent sources of financing as is necessary to demonstrate financial ability through intended credit arrangement or private equity placements by submission of the following detailed information for each of these arrangements:

(i) The terms of any executed loan or other form of credit arrangement intended to be used to finance the proposed construction, acquisition, or operation of the requested facilities including such information as the identity of the creditor (or creditors), the amount committed, letters of commitment, detailed terms of the transaction, including the details of any contingencies, and a statement that paragraph (e) of this section is complied with;

(ii) The terms of any executed sale or placement of any equity or other form of ownership interest, including the sale, or long-term lease for the lifetime of the satellite, of proposed satellite transponder capacity in the level of detail as specified in paragraph (d)(2)(i) of this section.

(iii) Any financing arrangements contingent on further action or performance by either party, including marketing of satellite capacity or raising additional financing, will not satisfy the requirements of subsection (c) of this section.

(3) Whatever other information or details the Commission may require.

(e) Any loan or other credit arrangement providing for a chattel mortgage or secured interest in any proposed facility must include a provision for a minimum of ten (10) days prior written notification to the licensee or permittee, and to the Commission, before any such equipment may be repossessed under default provision of the agreement.

(f) An applicant found to be qualified pursuant to paragraph (b) of this section may be initially assigned up to two orbital locations in each pair of frequency bands proposed and may be authorized to construct up to two ground spares. Authorizations to construct ground spares are at the applicant's risk that launch authorizations will not be granted by the Commission.

(g) Applicants requesting an additional orbital location beyond those initially assigned pursuant to paragraph (f) above, must demonstrate, using projections of historical use data for its in-orbit system, that the additional satellite will be 80% filled 3 years after the scheduled launch date. A transponder will be considered full if it is carrying the following amount of active traffic: 2892 voice channels if the transponder is configured to carry FDM-FM; 5000 channels if configured for CSSB; 60 Mbps if configured for digital transmissions; or 1 full-time television channel if configured for FM-TV. If the transponder is configured for frequency division multiple access, the total baseband information carried must be at least 4 MHz if configured for analog transmission or 30 Mbps if configured for digital transmission. Transponders that have been sold or leased for the expected lifetime of the satellite may be considered "full," but such transactions may not be included in projections of future fill. For other types of transponder arrangements, the appropriate fill requirements may be specified by the Commission based on the current state-of-the-art.

(h) A licensee who is now providing domestic satellite service to the public, and is unable to make the showing required in paragraph (g) of this section may be assigned one additional

orbital location in each pair of frequency bands in which it is currently providing service. However, this authorization will be conditioned upon the permittee demonstrating, prior to the launch of the additional satellite, that its existing in-orbit satellites in that band are 80% filled. Failure to do so will result in the launch authorization and orbital assignment becoming null and void.

(i) Every orbital assignment is subject to the requirement that the licensee continue to maintain an 80% fill. The 80% fill requirement may be demonstrated on an average basis over all of the licensee's satellites in a particular pair of frequency bands.

(j) In the event one or more applications satisfying the requirements of paragraphs (b), (c), (f) and/or (g) of this section are ready for grant, any orbital location occupied by a satellite not satisfying the requirement of paragraph (i) of this section may be cancelled and colocation of in-orbit satellites may be required. The Commission will take this action if in so doing, it would allow the grant of applications pending which satisfy the requirements of paragraphs (b), (c), (f) and/or (g). If a cancellation is made, the licensee will be afforded a period of 30 days to notify the Commission which of its assigned locations should be cancelled.

Comparative Hearing
Disqualification Financial
Disqualification Technical or Engineering
Site Availability

Review Board reversed *ID* and found applicant financially and technically disqualified. It never had reasonable assurance of a purported bank loan, only a letter of accommodation. It never had reasonable assurance of a transmitter site, but only *assumed* a lease could be had. Its belated amendment rejected. Grant made to competing applicant.
—*Dutchess Communications Corp.*
BC Docket No. 82-442

FCC 85R-49

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Dutchess Communications Corp. Poughkeepsie, New York	BC Docket No. 82-442 File No. BPH-810522AN
James A. Finley, Karen Marie Carpenter, Ann Marie Carpenter, and Laura J. Finley d/b/a Hudson Valley Communications Company Poughkeepsie, New York	BC Docket No. 82-443 File No. BPH-810925AQ
For Construction Permit for a New FM Station	

Appearances

Lawrence J. Bernard, Jr., on behalf of Dutchess Communications Corp.; and *Cheryl A. Kenny* and *Dennis F. Begley*, on behalf of Hudson Valley Communications Company.

DECISION

Adopted: June 6, 1985; Released: June 13, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Dutchess Communications Corp. (Dutchess) and Hudson Valley Communications Company (Hudson Valley) for authority to construct a new FM broadcast station to operate on Channel 221 at Poughkeepsie, New York. By *Hearing Designation Order*, 47 Fed. Reg. 32787, published July 29, 1982, these two applications (and two others subsequently dismissed voluntarily) were designated for full evidentiary hearing on the standard comparative issue. By *Memorandum Opinion and Order*, FCC 82M-3771, released November 29, 1982, presiding Administrative Law Judge Byron E. Harrison (ALJ) added issues to determine: (1) if Hudson Valley possessed the financial qualifications to purchase its proposed transmitter site and to make such transmitter site ready for its intended use; and (2) whether the transmitter site proposed by both Dutchess and Hudson Valley was suitable for the intended use. In an *Initial Decision* (*I.D.*), FCC 84D-69, released October 1, 1984, the ALJ resolved the latter two issues favorably to the applicants and, as a result, found them basically qualified. He then found Hudson Valley to be the comparatively superior applicant and granted its application.

2. The proceeding is before the Review Board on the exceptions filed by Dutchess (and the Hudson Valley reply). The Board has reviewed the *I.D.* in light of these pleadings, the oral argument held on February 1, 1985, and our review of the record as supplemented by Hudson Valley pursuant to our *Memorandum Opinion and Order*, FCC 85R-22, released March 12, 1985 (hereinafter "*M.O.&O.* at para. ____.b1 For the reasons that follow, we reverse the *I.D.*, find Hudson Valley financially and technically unqualified to be a licensee, and grant the competing application of Dutchess.

Basic Qualifications

3. *Financial Qualifications.* It is fundamental that an applicant be found financially qualified to build the station for which the construction permit is awarded and to have a sufficient reserve of unencumbered capital to operate the station for the initial start-up period without reliance on prospective advertising revenues. *United Broadcasting Co.*, 93 FCC 2d 482, 505-509 (1983); *GACO Communications Corp.*, 94 FCC 2d 761, 775 (Rev. Bd. 1983), *review denied*, FCC 84-212, released May 14, 1984 (Comm'n). The Commission's concern over this matter is clearly spelled

[1] We have before us the supplemental filings, a petition for leave to amend by Hudson Valley, and responsive pleadings.

out in *Financial Qualifications Standards for Aural Broadcast Applicants*, 69 FCC 2d 407 (1978); Congressional concern for the same matter is manifested in Section 308 of the Communications Act of 1934, as amended, 47 U.S.C. §308.[2] Although the Commission now permits new applicants to simply certify that they possess the financial ability to meet the Commission's qualifying financial standard, the agency has stressed that its substantive financial standard remains absolutely unchanged. *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381 (1981); *see also GACO Communications, supra.*[3] The Commission has recently briefed the

[2] The financial ability of an applicant to build when awarded a permit is no academic concern: the Commission has recently been compelled to rescind numerous construction permits granted to applicants who have not effectuated their pledges to build and commence operation of the stations. It is particularly important that an applicant awarded a construction permit over competing applicants be found financially capable; otherwise the enormous cost of the hearing process to the competing applicants and to the public will have been wholly wasted, and the entire application process must be begun again, with the attendant delay of several more years before the initiation of a new broadcast service. *See Sunrise Broadcasting, Inc.*, Mimeo No. 4123, released April 26, 1985 (Chief, Video Services Division). Therein, the Commission's Mass Media Bureau noted that: "In the 12 months preceding Sunrise's extension [of time to construct] application, the Commission cancelled 14 television construction permits for failure to construct within the time allotted." *Id.*, at para. 6.

[3] Two Commissioners, Commissioner Quello and Commissioner Fogarty, expressed serious misgivings about permitting applicants to merely certify, without any showing, that they possessed the requisite financial resources. *See Revision of Application* (FCC Form 301), *supra*, 50 RR 2d at 384. We regret to report that the Commission's reliance on the unsupported representations of broadcast applicants appears to have been misread, for the Board finds that applicant after applicant is sorely deficient in this regard. *See, e.g., Paradise Broadcasting and Communications System, Inc.*, 57 RR 2d 1013 (Rev. Bd. 1985) (applicant disqualified for falsifying assets); *Pepper Schultz*, FCC 85R-5, released January 28, 1985 (Rev. Bd.) (sole proprietor indicates no money for staff); *KIST Corp.*, 57 RR 2d 49, 51-55 (Rev. Bd. 1984) (no reasonable assurance of availability of $2 million bank loan); *Washington's Christian Television Outreach, Inc.*, 56 RR 2d 1539, 1543-1546 (Rev. Bd. 1984) (applicant principal files for bankruptcy without advising Commission); *California Broadcasting Corp.*, 98 FCC 2d 994 (Rev. Bd. 1984) (proceeding remanded to examine "most curious circumstances" surrounding financial proposal); *Mid-Ohio Communications, Inc.*, 56 RR 2d 238 (Rev. Bd. 1984) (proceeding remanded on, *inter alia*, issue to determine whether applicant failed to submit complete and accurate financial information and lacked candor); *Central Alabama Broadcasters, Inc.*, 97 FCC 2d 654 (Rev. Bd. 1984) (affirming dismissal of applicant who withdrew his financial certification in favor of reliance on heaven); *Coastal Bend Family Television, Inc.*, 94 FCC 2d 648 (Rev. Bd. 1983) (applicant financially disqualified and assigned substantial comparative demerit for lack of candor concerning its financial proposal); *GACO, supra* (applicant financially disqualified); *United Broadcasting, supra*, 93 FCC 2d at 509 (applicant who underestimated its costs and who lacked adequate liquid assets to meet costs financially disqualified).

court on the critical importance of an applicant's financial ability[4]:

> The Supreme Court has recognized that:
>
> > An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured, the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station. *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940) (footnote omitted).
>
> This Court, too, has long recognized that the FCC has imposed Congressionally authorized financial requirements to help insure the viability of a national television system. *WEBR, Inc.* v. *FCC*, 420 F.2d 158, 168 (D.C. Cir. 1969). The FCC has a legitimate and compelling interest in assuring that an applicant is financially qualified before it grants a construction permit. *See GACO Communications Corp., supra*, 94 FCC 2d at 781. It routinely considers the financial qualifications of all applicants — religious and secular — before issuing permits. Although the Commission now permits applicants seeking construction permits to 'propose to do so on a veritable "shoe string," *GACO Communications Corporation, supra*, 94 FCC 2d at 781, the FCC still believes that a modicum of assurance is necessary. [footnote omitted]

That is not to say that an applicant must possess the equivalent of cash-on-hand to meet its prospective financial obligations, or even show a guaranteed source; all that is required is that an applicant have "reasonable assurance" at the time it files that the necessary finances will be available. *Jay Sadow*, 39 FCC 2d 808, 810 (Rev. Bd. 1973). On the other hand, as the Commission recently advised the court in the *Oyster* brief, "[i]t is not sufficient for an applicant to simply believe that it will be financially qualified by the time it obtains a construction permit."[5]

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[4] Brief of FCC in *James L. Oyster* v. *FCC*, No. 84-1562 (D.C. Cir. 1984), at 10. Earlier in the brief, the Commission explained to the court:

> It is not sufficient for an applicant to simply believe that it will be financially qualified by the time it obtains a construction permit. Instead, as summarized in the current version of the FCC Form 301, an applicant must certify that it has sufficient net liquid assets on hand or available from committed sources to construct and operate the proposed station for three months without revenue. Moreover, if some or all of the financing is to be provided by others, the applicant must have reasonable assurance of a present firm intention for each agreement to furnish financing. The applicant must be able and willing to meet all contractual requirements with respect to collateral, guarantees, and capital investment, and the applicant must have determined that a reasonable assurance exists that all sources other than financial institutions, banks, and equipment manufacturers have sufficient net liquid assets to meet their commitments. *Revision of Form 301, supra*, 50 Rad. Reg. 2d (P&F) at 382, 397. *See GACO Communications Corp.*, 94 FCC 2d 761, 775 (Rev. Bd. 1984), *review denied*, FCC 84-212, released May 15, 1984; *United Broadcasting Co. (KBAY-FM)*, 93 FCC 2d 808, 832 n.101 (1983).

Id., at 3-4 (footnote omitted).

[5] *FCC Brief, supra* note 4, at 3.

4. As indicated in our *M.O.&O.* calling for supplemental information from Hudson Valley, sufficient question was raised about that applicant's finances that the ALJ added a hearing issue to determine whether it had the requisite reasonable assurance of the funds necessary to effectuate its proposal. In response to this serious and potentially disqualifying issue,[6] Hudson Valley submitted a letter of January 14, 1983 from BankEast of Manchester, New Hampshire. Apart from the fact that the BankEast letter was defective on its face insofar as supplying reasonable assurance of a bank loan and, unaugmented, should not have been credited,[7] the circumstances giving rise to that January 1983 letter raised inescapable doubts as to whether the BankEast missive reflected a good faith loan commitment or merely an accommodation letter written at the behest of a kinsman of a Hudson Valley principal. We noted that:

> (1) '[n]one of the principals of Hudson Valley had ever dealt with BankEast before'; (2) 'Hudson Valley never filed a written loan application with the bank'; and (3) while a Hudson Valley principal claims that she had 'informally' applied for the loan by long-distance telephone and given the bank an 'oral' financial statement, the principals 'never heard from the bank after sending it their financial information' some weeks later.

M.O.&O. at para. 4 (footnotes omitted).

5. The Board determined to permit Hudson Valley to explain these circumstances by way of supplementation of the record so as to remove

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[6] As recounted in the *M.O.&O.*, the financial issue was added upon evidence that Hudson Valley's reliance upon a kinsman (Dr. William Smith) of a principal of Hudson Valley was upset when the kinsman reported to the applicant that the bank upon which *he* was relying desired an application fee. *Id.*, at n.1; *see also I.D.* Concls., para. 19. Hudson Valley declined to pay that fee, *see id.*, at para. 20.

[7] As pointed out in our *M.O.&O.*, the BankEast letter was conditioned, *inter alia*, on the provision of "acceptable collateral," *id.*, at para. 3, and the Commission has stated clearly that such commitments are inadequate where "[t]here is no evidence in the record as to what collateral would be acceptable to the bank." *Id.*, at para. 6 (*quoting Chapman Radio & Television Co.*, 70 FCC 2d 2063, 2072 (1979)). In fact, Hudson Valley moved to amend its application on May 9, 1985 by proffering a BankEast letter of February 17, 1984 in lieu of the prior letter; the collateral specified in the later letter is "all the physical assets of the business." Hudson Valley Petition for Leave to Amend (Attachment). However, as the petition reveals, Hudson Valley has substantially revised its original financial plan (it now estimates construction and 3-month operations to run $221,000 rather than the $115,290 last projected), including an entirely new proposal to purchase rather than lease its operating equipment (as previously specified). Dutchess opposes this 13th hour amendment proposing to purchase rather than lease by Hudson Valley. *See* Dutchess Opposition at 13-16. The salient point here is that, inasmuch as Hudson Valley originally proposed to *lease* all of its transmitting equipment, the "business" would have had few physical assets to hypothecate at the time of the 1983 letter. *See M.O.&O.*, at para. 6. It would seem, therefore, that Hudson Valley now proposes to "purchase rather than lease" so that it can claim assets to collateralize.

any significant questions and,[8] optimistically, to avoid the need to remand for further evidentiary hearings.

6. Hudson Valley has supplemented as ordered; but, alas, the material submitted — while certainly removing all significant question — does nothing short of confirming our worst apprehensions. Thus, the author of the January 1983 BankEast letter, bank chairman Walter N. ("Rink") DeWitt, supplied an affidavit which, in pertinent part, avers[9]:

> I have been asked to describe the circumstances that led to my issuance of the January 14, 1983 letter. In early January of 1983, I was contacted by Dr. William Smith, with whom I was personally acquainted and with whom BankEast had had previous financial dealings. Dr. Smith told me that his sister, her husband and two other persons had formed a partnership to seek an FCC construction permit for a new FM station at Poughkeepsie, New York and that the partnership was seeking a bank loan commitment for the construction and operation of the station. Dr. Smith told me he had great confidence in their ability and desire to build and operate a successful station. He also told me that all of them were responsible individuals and good credit risks. Because of our experience at that time with Dr. Smith and his recommendation and assessment, I told him BankEast *would consider* the Hudson Valley project. While I have no specific recollection today, over two years later, I probably discussed the matter by telephone with Dr. Ann Carpenter. Either in that conversation or otherwise, I was provided with some information about Dr. Carpenter and Hudson Valley's other partners and Hudson Valley's proposal for the new station.

DeWitt went on to state[10]:

> I have been asked to describe what two of the conditions of our letter of January 14, 1983 mean, namely what is meant by 'acceptable collateral' and 'acceptable loan guarantees'. In the context of the request for the letter in this instance, I understood that this was a dynamic, as opposed to a static, proposal. *That is, no loan application was made, nor could it be made until the concept was finalized.* There was no existing business. The proposal was not in the immediate future and the project was fluid. As of the time of an actual loan, the combination of pledged hard assets and the financial strength of the personal guarantors would have to be sufficient to satisfy BankEast that it has adequate collateral to insure that if the loan were to go into default, the bank could be made whole by realizing its investment from the collateral.

To put it charitably, that January 1983 letter obviously represents no considered commitment to a Hudson Valley loan; indeed, we have seen routine bank advertisements in daily newspapers which offer an assurance of loan monies at least as firm.[11] Having confirmed itself that no

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[8] The Commission and the Board sometimes permit record supplementation in hopes of obviating the need for further hearings. *See, e.g., Garrett, Andrews and Letizia, Inc.*, 88 FCC 2d 620, 623-625 (1981); *Coastal Bend Family TV, Inc.*, 95 FCC 2d 551 (Rev. Bd. 1983) (*citing Order*, FCC 83R-59, released August 26, 1983).

[9] Hudson Valley Supplement, Exh. No. 1 at 1 (emphasis added).

[10] *Id.*, at 2 (emphasis added).

[11] Nor, in the patois of the communications bar, is the BankEast letter even the typical "Swiss cheese" letter, in which the bank positively affirms the loan and its specific

bona fide loan application was either received or considered, Hudson Valley has proceeded *to this point* without the slightest assurance that it had access to the necessary bank financing. Its submission of the January 1983 bank letter (under the circumstances revealed) in order to avert a hearing issue on its finances was either naive or cynical, depending on the inferences drawn.[12] We will make no inferences; it is sufficient to find that Hudson Valley had altogether no "*reasonable* assurance" of the bank financing necessary to support its proposal, as that term is defined by the Commission. *See, e.g., Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980) ("[a] *present firm* intention to make a loan, future conditions permitting, is the essence of our 'reasonable assurance' standard.").[13]

7. *Transmitter Site.* Our *M.O.&O.* requested additional information on Hudson Valley's proposed Vervalin Mountain transmitter site, there being some serious questions raised as to that applicant's ability to secure the site, both at hearing and in the exceptions to the *I.D. See M.O.&O.* at para. 8 *et seq.* Because (to no real surprise) Hudson Valley finally advised the Board by its April 15, 1985 supplementation of the record that the Vervalin Mountain site is not available to it, and, on May 9, 1985, sought our leave to amend its application to specify an entirely new site, we will treat with this matter hereinbelow in the context of the requested application amendments, stressing the fact that — unless its site amendment is accepted — Hudson Valley is conclusively disqualified.

Hudson Valley Petition for Leave to Amend

8. In its aforesaid petition of May 9, 1985, Hudson Valley — nearly 3 years after designation for hearing[14] — seeks to substantially amend its application with respect to the basic qualifying elements of (1) its financial proposal and (2) its transmitter site. As to the former, the applicant asserts that its "revised cost estimates are . . . linked to the involuntary change in transmitter site, and [its] new plan to lease rather than

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terms, but crafts the customary loopholes through which it might withdraw if circumstances change.

[12] Insofar as the record shows, Hudson Valley has been represented throughout by competent communications counsel.

[13] Because we find that Hudson Valley, *ab initio*, was not financially qualified, we need not delve further into the question of whether it misrepresented or lacked candor on the issue of its finances. *See M.O.&O.* at para. 11. Suffice it to say that the information adduced pursuant to our supplementation request reveals inconsistencies in the financial showings of the principals, and possibly worse. *E.g.*, Dr. Carpenter's alleged net worth apparently dropped, without explanation, from a previously claimed $203,000 to $94,000. Dutchess Comments at 15. For other examples, *see id.*, at 12-16. Under no circumstances could Hudson Valley be licensed without a hearing to resolve the numerous questions about its general candor on its financial ability.

[14] *See Hearing Designation Order*, 47 Fed. Reg. 32787, published July 29, 1982.

purchase its transmitter site"[15]; it further claims that is "financial amendment provides a much more current and realistic financial proposal than the one currently on file."[16] As to the change in the Vervalin Mountain transmitter site, Hudson Valley submits that — despite all the obvious doubts raised years ago — it learned (through counsel) only "in approximately the second week of April, 1985, that the Vervalin Mountain site it and Dutchess proposed would no longer be available."[17]

9. In weighing requests to amend an application at a point in time after a hearing has commenced, we are bound to apply the "good cause" test imposed by Section 73.3522 of the Rules, 47 CFR §73.3522. The elements of that test are expatiated upon in *Erwin O'Conner Broadcasting Co.*[18] In the recent past, the Commission has relaxed that test somewhat insofar as it applies to matters such as bank loans, *see Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), and it has held that the elements contemplated in *Erwin O'Conner* (*see supra* note 18) "should be interpreted in light of the equities of the case, especially where a proffered amendment is intended to cure a disqualifying defect." 87 FCC

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[15] Hudson Valley Petition at 8. Some might find it passing strange that Hudson Valley seeks to amend its financial proposal upwards from its prior $115,290 (*See M.O.&O.* at para. 6) to $221,000 (Hudson Valley Petition at 3), in part, on the ground that it now plans to "lease rather than purchase its transmitter site." Stranger still when it is recalled that the applicant previously anticipated a cost of $35,000 to purchase its original site (*see M.O.&O.* at para. 10), but now anticipates a site cost of only $2,970 for "Pre-Construction Tower and Transmitter Building Rent (18 months at $165.00)." *See* Hudson Valley Amendment (Attachment). In fact, even under Hudson Valley's prior "hypothetical" rental estimate, its original site was estimated at a cost of $750 per month, *M.O.&O.* at para. 9, not the $200 per month of its amended estimate.

[16] Hudson Valley Petition at 10. To be sure!

[17] Hudson Valley Petition at 5. But, Dutchess asserts that "for good consideration" it was, in 1981, "granted an exclusive option" on its site, and further that:

> Dutchess principals have met with the owners of the land, the proposed buyer and their representatives since receiving Hudson Valley's Supplement and Dutchess continues to represent to the Commission that it has reasonable assurance of the availability of the site under its February 1981 option.

Dutchess Opposition to Petition at 5 & n.2. Lacking any solid ground at this juncture to question its representation, we will accept this claim. *However*, should Dutchess seek to amend its own Vervalin Mountain site at a later stage, we trust that its amendment will receive the strictest scrutiny under 47 CFR §73.3522(b)(1)(i)-(ii).

[18] 22 FCC 2d 140 (Rev. Bd. 1970). The six elements considered thereunder are:

> (1) due diligence; (2) involuntariness; (3) the lack of need for the modification or addition of new hearing issues or parties; (4) no disruption of hearing process; (5) no prejudice to other applicants; (6) no comparative 'upgrading.'

Id., at 143.

2d at 489 (footnote omitted).[19]

10. For that reason, Hudson Valley can take no refuge in *Anax Broadcasting*. In *Anax*, the Commission found that the ALJ had rendered "an excessively harsh interpretation of the due diligence requirement," 87 FCC 2d at 489, when he rejected an amendment tendered to cure a financial ambiguity noted in the Commission's hearing designation order ("bank letters . . . not sufficient to demonstrate financial qualifications," *id.*, at 487). There, the applicant "was actively involved in negotiations for necessary funds" to cure the ambiguity at the prehearing stage. *Id.* The curative amendment "was tendered within a few days of the deadline for amendments as of right, and prior to the date set by the ALJ for amendments . . . ." *Id.*, at 489. The facts here could not be more dissimilar. Hudson Valley sought bank financing, indirectly at first, through a kinsman of a principal. It certified on its application that it had the requisite financing, apparently from Dr. Smith (Tr. 389), who — in turn — was relying on a potential bank loan. But the Hudson Valley principals declined to provide a commitment fee to that particular bank (*see id.*[20]), so Dr. Smith then referred them to BankEast. As has been shown, however, the January 1983 BankEast letter was, reviewed kindly, grossly deficient. *See supra* paras. 3-6. Nearly 1½ years later, the applicant seeks to substitute a new financial plan and a new bank letter.[21]

11. We find that Hudson Valley never seriously negotiated, nor received, bank financing. It made one long-distance phone call to an alien bank, submitted no loan application nor genuine financial statements, neither negotiated nor received customary loan terms, received no approval of its collateral or personal loan guarantees, and — insofar as the record shows — did not follow-up the BankEast letter with the slightest attempt to maturize any possible commitments. This is no diligence at all. As to "good cause" for submission of an entirely new financial plan, Hudson Valley claims that its "revised cost estimates are also linked to the involuntary change in transmitter site, and the new plan to lease rather than purchase its transmitter site."[22] As suggested *supra* note 15, no support is proffered for this apparent *non sequitur*, and its

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[19] The Board utilizes the *Anax Broadcasting* concept in reviewing application amendments. *See Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360, 1362-1364 (Rev. Bd. 1983) (remand order).

[20] *See also I.D.* at Concls. para. 20.

[21] Hudson Valley has here proffered a BankEast letter of February 17, 1984. However, that letter was previously proffered after the close of the record and squarely rejected by the ALJ. *Order*, FCC 84M-1458, released March 27, 1984. Hudson Valley never objected to that ruling, but nonetheless seeks to enter the letter here. This maneuver will be spurned. *See generally* 47 CFR §1.227(a).

[22] Hudson Valley Petition at 8. We do not accept that its transmitter site change was "involuntary" as that term is intended, about which more *infra* paras. 12-15.

assertion here seems disingenuous in light of the sharp *reduction* in transmitter site costs indicated in the Hudson Valley amendment. In any event, Hudson Valley never had "reasonable assurance" of bank financing, and its financial amendment is rejected. *KIST Corp.*, 57 RR 2d 49, 51-55 (Rev. Bd. 1984) (application for review pending).[23]

12. Hudson Valley's request to amend its application to specify an entirely new transmitter site has, if anything, less "good cause" merit than its financial amendment request.[24] The Commission has held that its engineering amendment standard contains a stricter "foreseeability" element than other amendments. 47 CFR §73.3522(b)(1)(i)-(ii); *California Broadcasting Corp.*, 90 FCC 2d 800, 809 (1982); *Belo Broadcasting Corp.*, 68 FCC 2d 1313 (1978). As recounted in our *M.O.&O.* (at para. 8 *et seq.*), while the Hudson Valley principals relied on one kinsman (Dr. Smith) to secure its financing, they relied on another (Richard Moore) to help acquire a transmitter site on Vervalin Mountain. The owner of the site wrote to Hudson Valley indicating only a willingness to negotiate a possible sale of the site, and Hudson Valley concedes that the site owner expressly told Richard Moore in 1982 that it would not lease the site.[25] Despite being so informed, Hudson Valley (1) "assumed" that the land would be leased to it and (2) even "assumed" a hypothetical $750 per month rental fee. *See M.O.&O.* at para. 9. It continued to specify the Vervalin Mountain site, in part it claims, because Moore never advised it of the landowner's second express refusal to lease the site.[26]

13. The record makes clear that, at least since August 30, 1982, when a competing applicant moved to enlarge the issues against Hudson Valley on an assertion that Hudson Valley could not lease the Vervalin Mountain site,[27] Hudson Valley has been keenly aware that its claim to the site was doubtful. Nevertheless, Hudson Valley did not subsequently seek to

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[23] *Compare Washington's Christian Television Outreach, Inc.*, 56 RR 2d 1539 (Rev. Bd. 1984) (applications for review pending), where the ALJ accepted a financial amendment in lieu of an applicant's original financing; that applicant, however, had been disqualified too hastily at hearing on its original plan, and even sought at a remand hearing to support that original plan, until invited by the ALJ to amend. *See id.*, at 1546-1550. Because of the ALJ's express (though perhaps erroneous) invitation, we reluctantly accepted the late amendment, the equities by that time clearly running to the applicant.

[24] Hence, even if we closed our eyes to Hudson Valley's failure to secure "reasonable assurance" of financing, our rejection of its transmitter site amendment leaves it equally disqualified.

[25] Hudson Valley Supplement at 7; *see also M.O.&O.* at para. 9 & n.16.

[26] *See id.* While this claim appears far-fetched, the ALJ declined to add a misrepresentation or lack of candor issue against Hudson Valley. *See* Hudson Valley Supplement at 7. Considering the Dutchess claim to have purchased an exclusive option on the site of 1981, *see supra* note 17, we note that Hudson Valley's later assertion that it could purchase the land for $35,000 was also simply "assumed."

[27] *See* Dutchess Exceptions at 21 & n.14.

negotiate either a lease or a purchase of the site or to, forthwith, locate and secure reasonable assurance of a new site. Rather, throughout both the hearing and the appeal process before the Board, it attempted to stonewall, relying tenaciously on the Vervalin Mountain site *as if* it yet had "reasonable assurance" thereof.[28] When, after 3½ years, its bluff was finally called, it came up predictably short, and it (1) conceded on April 15, 1985 that it had no Vervalin Mountain site[29] and (2) sought to amend to specify a new site on May 9, 1985.

14. The Board has recently reiterated that an applicant cannot merely have vague discussions with a site owner, negotiate no *bona fide* arrangement, and earnestly represent "reasonable assurance" of that site. *South Florida Broadcasting Co., Inc.*, 57 RR 2d 495 (Rev. Bd. 1984). Although no formal written agreement is necessary, the Commission has long held that some firm understanding is essential. *See id.*, at 499 n.10 (*quoting William F. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1974); *El Camino Broadcasting Corp.*, 12 FCC 2d 25, 26 (Rev. Bd. 1968)). Here, Hudson Valley negotiated no lease or lease terms with the site owner; and carefully avoiding the owner's offer to negotiate a sale, it simply hypothesized a $750 per month lease. *See M.O.&O.* at para. 9.[30] Later, it seems, it merely assumed it could acquire the site at the purchase price claimed by Dutchess in its option on that land; it neither discussed nor negotiated its own possible purchase with the site owner, even though it recognized in the summer of 1982 that no lease was in the offing. An applicant may not simply "assume" to another's site option. *South Florida Broadcasting, supra.* There we observed that one applicant, First Black, had secured an option with valuable consideration; the other applicants — although having a chance to do the same — did nothing, but casually assumed the First Black site for themselves as well. We stated:

> To permit subsequent applicants to merely 'assume' a competing optionee's site or a right of succession would put a costly premium on being the first to secure a site and would perversely penalize the prudent. In our view, applicants should not be allowed to sit back while a competitor truly secures 'reasonable assurance' of a site — often at considerable expense — and then languorously sit on their assumptions.

57 RR 2d at 501-502 (footnotes omitted).

15. The Board, the Commission, and the court have recently reaffirmed that an applicant claiming a transmitter site cannot merely assume

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[28] *See* Tr. of Oral Arg., February 1, 1985, at 2541-2550.

[29] Hudson Valley Supplement at 9.

[30] The only basis for this monthly lease figure was the random estimate of a Hudson Valley principal, an Englewood, New Jersey chiropractor. Hudson Valley asked that we "presume" that the chiropractor — as a professional woman — was knowledgeable as to New York mountaintop rental prices. *See M.O.&O.* at n.17. We are no more willing to presume this than we are to expect that Poughkeepsie realtors are adept at stimulating the phagocytes (*see* George Bernard Shaw, *The Doctor's Dilemma* (*passim*)).

it will secure that site or ignore a site owner's conditions for the acquisition, and later seek to amend when its blithe assumptions collapse. *See Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984 (Comm'n), *aff'd mem. sub nom. Royce International Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir. filed April 30, 1985); *Valley FM Radio*, 57 RR 2d 420 (Rev. Bd. 1984). Because we find that Hudson Valley never seriously negotiated the acquisition of the Vervalin Mountain site, its representation of reasonable assurance of that site to the Commission in its 1981 application was hollow; and we further find that its continued specification of that site, without either negotiating or conferring with the site owner after serious questions were raised in 1982, deprives it of any equity that might derive from a site owner's unexpected *volte face. See, e.g., Santee Cooper Broadcasting Co.*, 57 RR 2d 662, 678-681 (Rev. Bd. 1984), *recon. denied*, 57 RR 2d 1363 (1985) (applications for review pending). Hudson Valley clearly has not met the ordinary test for amending its application at this late post-hearing date, let alone the stricter foreseeability test for engineering amendments provided for in 47 CFR §73.3522(b)(1)(i)-(ii). *Compare California Broadcasting, supra* (site originally specified later legislated into public park; environmental issues raised).[31] Permitting Hudson Valley to amend here would make an utter travesty of our application process, our substantive standards, and the procedural rules adopted to ensure fairness, orderliness, and the timely provision of broadcast service to the public. *See Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978). In future cases, Hudson Valley will serve as a perfect example of the antithesis of diligence, good faith, and reasonable assurance in the matter of its transmitter site.

Conclusions

16. The Commission has carefully laid out an application process intended to assure fairness to all interested prospectants and expedition on behalf of all applicants and the public. *See* 47 CFR §73.3511 *et seq.* The first principle of that process is that those filing an application for a broadcast construction permit be *ready, willing* and *able*. It is the express intention of the Commission that applicants have their proposals in order at the time filed; and, although applicants may generally amend prior to the specified cut-off date as a matter of right so as to accomplish any last-minute adjustments or firming-up, *see* 47 CFR §73.3522(a), all basic

[31] Inasmuch as we reject Hudson Valley's all-too-predictable amendment of May 9, 1985, and find it, thus, unqualified, we need not remand for a hearing to determine whether it intentionally misrepresented its assurance of a transmitter site in 1981 or, thereafter, lacked candor in continuing that representation. But such a hearing would be required before any license could issue to Hudson Valley, and we will not delay the initiation of new service any longer than that unqualified applicant has already managed.

arrangements necessary to pursue the application should be *completed* before a full comparative hearing on any competing proposals is to commence. *See Belo Broadcasting Corp., supra*, 68 FCC 2d at 1320 ("the application should be finalized in advance of the start of the actual hearing"). Indeed, any "major change" in an application made in the post-cut-off/pre-hearing phase of the processing will result in the actual removal of that application from the proceeding. 47 CFR §73.3573(b); *see also Clay Television, Inc.*, 52 RR 2d 406 (1982); *cf. Grace Missionary Baptist Church*, 80 FCC 2d 330 (1980). Applicants seeking to make changes after the start of the hering must demonstrate "good cause," 47 CFR §73.3522(b),[32] by meeting a six-part test so as not to delay the proceeding or prejudice any competing applicants. *Belo Broadcasting Corp., supra; Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).[33]

17. In the case of changes in application proposal which go to basic qualifying matters, the Commission has recently relaxed its "good cause" standards, *Anax Broadcasting, supra*, but those seeking to avail themselves of the Commission's equity in this regard must make some showing of good faith on their part. *See id.*, 87 FCC 2d at 489; *Shoblom Broadcasting, supra*, 95 FCC 2d at 446. On the other hand, an applicant may not proceed — as has Hudson Valley here — without seriously confirming the rudimentary struts of its proposal; and, in the manner of Dickens' Mr. Micawber, hope that "something will turn up."[34] It is unarguable from the evidence that Hudson Valley had come to this Board with neither the reasonable assurance of primary financing nor a place from which to transmit; if further evidence were necessary, it is supplied, without doubt, by the nature and magnitude of the amendatory material submitted to us, including a cost projection of nearly double its original proposal (little or none of which is laid to inflation), and the "abandonment" of a transmitter site it never secured but — until its April 1985 supplement — doggedly argued was available to it. Finally, to the extent that Hudson Valley makes any equity-based claims, the essence of such claims is that the applicant did not deceive the Commission, but rather deceived itself in its vain reliances. From our vantage point, however, Hudson Valley's glaring deficiencies result, at best, from (to use a phrase

[32] *But see id.*, at §73.3522(b)(2) (amendments to cure defects found at designation for hearing may be submitted within 30 days).

[33] As discussed *supra*, amendments directed to *engineering* aspects of the application are subject to a stiffer foreseeability test. 47 CFR §73.3522(b)(1)(i)-(ii); *California Broadcasting, supra.*

[34] Or, perhaps, that *nothing* will turn up — nothing incriminating, that is.

we have employed before[35]) willful myopia or, at worst, hapless legerdemain. Either way, Hudson Valley's conduct should not be condoned or rewarded by further consideration of its application. It is not qualified, whereas Dutchess is so.

18. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed May 9, 1985 by James A. Finley, Karen Marie Carpenter, Ann Marie Carpenter, and Laura J. Finley d/b/a Hudson Valley Communications Company IS DENIED; and

19. IT IS FURTHER ORDERED, That the application of Dutchess Communications Corp. (File No. BPH-810522AN) for authority to establish a new FM broadcast station at Poughkeepsie, New York IS GRANTED, and the application of James A. Finley, Karen Marie Carpenter, Ann Marie Carpenter, and Laura J. Finley d/b/a Hudson Valley Communications Company (File No. BPH-810925AQ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Reveiw Board*

[35] *Central Alabama Broadcasters*, 88 FCC 2d 1501, 1527 (Rev. Bd. 1982), *recon. denied*, 89 FCC 2d 1029, *aff'd*, FCC 83-210, released May 2, 1983, *aff'd mem. sub nom. Montgomery Independent Telecasters* v. *FCC*, No. 83-1557 (D.C. Cir. filed March 1, 1984).

FCC 84D-69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Dutchess Communications Corp. Poughkeepsie, New York	BC Docket No. 82-442 File No. BPH-810522AN
James A. Finley, Karen Marie Carpenter, Ann Marie Carpenter, and Laura J. Finley d/b/a Hudson Valley Communications Company Poughkeepsie, New York	BC Docket No. 82-443 File No. BPH-810925AQ
For Construction Permit for a New FM Station	

Appearances

Lawrence J. Bernard, Jr., on behalf of Dutchess Communications Corp.; *Dennis F. Begley* and *Cheryl Kenny* on behalf of Hudson Valley Communications Company and *Stephen Yelverton* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

Issued: September 26, 1984; Released: October 1, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Dutchess Communications Corp. (Dutchess) and James A. Finley, Karen Marie Carpenter, Ann Marie Carpenter, and Laura J. Finley d/b/a Hudson Valley Communications Company (Hudson Valley) for a construction permit for a new FM station to be operated on Channel 221A (92.1 mHz) at Poughkeepsie, New York.

2. These two applications, along with the applications of J. Russell Patterson and Paul Sidney d/b/a Wappingers Falls Broadcasting Company (Wappingers Falls) and Harmony Broadcasting Corp. (Harmony) were

designated for hearing by the Chief, Broadcast Bureau,[1] on July 23, 1982, *Hearing Designation Order*, 47 Fed. Reg. 32787 (July 29, 1982), on the following issues:

(a) To determine the areas and populations which would receive primary aural service (1 mV/m or greater) from the proposals and the availability of other primary service to such areas and populations.

(b) To determine, with respect to Hudson Valley and Wappingers Falls, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

(c) To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

(d) To determine, in the event it is concluded that a choice between the applications should not be based solely upon considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest; and

(e) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By *Order*, FCC 82M-3300, released October 25, 1982, and *Order*, FCC 82M-3688, released November 22, 1982, in response to Motions for Partial Summary Decision filed by Wappingers Falls and by Hudson Valley, the Presiding Judge resolved the air hazard issue (Issue b) favorable to Wappingers Falls and to Hudson Valley.

4. By *Memorandum Opinion and Order*, FCC 82M-3771, released November 29, 1982, in response to motions by Harmony and Dutchess, the Presiding Judge added the following issues:

To determine if Hudson Valley possesses the financial qualifications to purchase its proposed transmitter site and to make such transmitter site ready for its intended use.

To determine whether the transmitter sites as proposed by Dutchess, Hudson Valley, and Wappingers Falls are suitable in terms of physical characteristics for the intended use.

The Presiding Judge further ordered that the limited financial issue against Hudson Valley is a basic qualification issue and that Hudson Valley would have the burden of proceeding and the burden of proof on that issue. The Presiding Judge also ordered that the transmitter site issue specified against Dutchess, Hudson Valley and Wappingers Falls goes to the basic and/or comparative qualifications of each of the three applicants and that Harmony shall have the burden of proceeding and each applicant against whom the issue is specified would have the burden of proof.

5. Wappingers Falls' application was voluntarily dismissed with prejudice by *Memorandum Opinion and Order*, FCC 83M-2060, released June

[1] Now the Mass Media Bureau.

23, 1983. The dismissal of Wappingers Falls' application moots the Section 307(b) issue (Issue c) since all remaining applicants have designated Poughkeepsie as the proposed community of license.

6. The record was originally closed on June 23, 1983. However, by *Memorandum Opinion and Order*, FCC 83M-2921, released August 30, 1983, the record was reopened and the issues were enlarged against Harmony. By *Memorandum Opinion and Order* released February 16, 1984, the Harmony application was dismissed with prejudice, pursuant to a Joint Settlement Agreement and the record was again closed. Prehearing conferences were held on October 7, 1982 and January 5, 1983. Hearing sessions were held on February 9, 10, 11 and 28, 1983 and on March 1, 2, 3, 4, 14, 15, 16, 23, 24, and 25, 1983.

Findings of Fact

Site Suitability Issue

7. Both Hudson Valley and Dutchess have proposed to locate their transmitters on the top of Vervalin Mountain in Poughkeepsie, New York (Tr. 433-434). Harmony presented several maps and photographs showing the Vervalin Mountain area (Harmony Exhibit 8). Harmony also presented the testimony of Mr. David Petrovits, president of an excavating company, stating that there are no roads or electricity to or near the top of the mountain (Harmony Exhibit 9).

8. Dutchess' principal, Mr. Irwin Katz, testified that he was driven to the exact location of the proposed transmitter site and physically inspected that area approximately two years prior to the February 9, 1983 hearing session (Tr. 139). The antenna site as proposed by both Hudson Valley and Dutchess is marked by a concrete marker embedded in the ground and protruding approximately 12 inches above the ground[2] (Tr. 144).

9. Mr. Katz was driven to the top of Vervalin Mountain in a four-cylinder, four-wheel drive jeep vehicle (Tr. 139) by Henry Frank, owner of the proposed transmitter site and the land adjacent to the site (Tr. 140, 153). Mr. Katz drove to the Vervalin Mountain summit from both Vail Road and Overlook Road (Tr. 147). The distance from the nearest paved road to the site is about 3,000 feet; 1,500 feet is through a wooded area along a logging trail and the remainder is through a cleared area (Tr. 140-141). The condition of this logging road was described as "rough" but the level of incline, ingress and egress were good (Tr. 141). It was Mr. Katz's opinion, based on some 30 years of sales experience with cars and trucks, as well as road building, that a bulldozer could be used to clear the road and that simple rough-grading and gravelling would be sufficient to make

[2] This is a geodetic survey marker (Tr. 434).

the road usable (Tr. 143, 172-173). The plateau area after the logging road would simply need "a scraper across the top of some gravel" (Tr. 143).

10. Mr. Katz recognized that, at present, there is no power available at the transmitter site, but there was power at both Overlook Road and Vail Road (Tr. 145, 147). He is not certain which route would be shorter, but there is power available at both sides of the mountain (Tr. 145). The distance from the nearest power line to the transmitter site is approximately 3,000 feet (Tr. 174). Mr. Katz did contact Mr. Frank, the owner of the land about an electrical contractor and Mr. Frank referred him to a Mr. Joseph R. Wilson who was familiar with the area and an acceptable contractor as far as Mr. Frank was concerned (Tr. 147, 175-176, 179).

11. The electrician advised Mr. Katz that power could be brought to the site "[A]t a very modest cost" (Tr. 147-148). The electrician discussed supplying power of several thousand watts which would require the erection of 3,000 feet of wire and 14 poles to carry it (Tr. 149). Dutchess obtained its estimate based upon these figures (Tr. 149).

12. Mr. Katz testified that Mr. Frank owns the site and access to the site via Vail Road (Tr. 153). Mr. Frank told Mr. Katz that there are many acceptable roads for ingress and egress (Tr. 153, 167).

13. Hudson Valley's principals also visited the Vervalin Mountain site, after obtaining permission from the Sleight family to cross their property[3] (Tr. 442). Dr. Carpenter testified that the transmitter site was located by reference to a geodetic survey marker on top of Vervalin Mountain (Tr. 434). It was Dr. Carpenter's view that an access road could be built across an area of an open field to an existing log roadway going up the mountain (Tr. 434). Dr. Carpenter testified that she had been able to walk to the top of Vervalin Mountain during a period when there was snow on the ground (Tr. 468).

The Financial Issue

14. A limited financial issue was added against Hudson Valley by *Memorandum Opinion and Order*, FCC 82M-3771. Hudson Valley partner, Dr. Anne Carpenter was primarily responsible for estimating the costs of constructing and operating the station. The total estimated cost for construction and operation for three months is estimated to be $112,890 (Tr. 335-337; Hudson Valley Exhibit 7, page 1).

15. Hudson Valley estimates the cost to purchase the land for the transmitter site at $35,000 (Hudson Valley Exhibit 7). This estimate was based upon the fact that one Richard Moore, acting on behalf of Hudson Valley, checked the Poughkeepsie land records and found the Frank

[3] The Sleight property is located to the north of the site off of Overlook Road. Vail Road is south of the property. See Harmony Exhibit 30, page 2; Harmony Exhibit 8, page 1, and Tr. 145.

brothers to be owners of the site (Tr. 375-376). Dr. Carpenter testified that, based upon FCC records, the Frank brothers would sell the property for $30,000 to $35,000 (Tr. 374). Similar statements were made by Mr. Frank to Mr. Moore who had obtained this information on behalf of Hudson Valley. Dr. Carpenter obtained permission from the Sleights to cross the property and Mr. Sleight has indicated he would be willing to sell a portion of his land for access to the site (Tr. 442).

16. Hudson Valley also obtained estimates for making the transmitter site ready for construction. These estimates included $4,800 for providing electric power to the site and $3,500 to provide a gravel road to the site (Hudson Valley Exhibit 7; Tr. 425; Dutchess Exhibit 4). The $3,500 estimate for providing a gravel road is based upon a verbal quotation from Mr. David Alexander, a Wappingers Falls road contractor (Tr. 381-382). Mr. Alexander indicated the cost for clearing terrain and installing a 12-foot wide gravel road (Tr. 381-382, 386) from Overlook Road to the top of Vervalin Mountain (Tr. 385-386) would be approximately $7 a foot for heavily wooded areas and $1 a foot for open areas (Tr. 449). The estimate included labor and materials (Tr. 449-450) and estimated 200 feet of heavily wooded area had to be cleared ($1,400) and 2,000 feet of open area ($2,000) for a total of $3,400 which Dr. Carpenter rounded off to $3,500 for road construction to the antenna site (Tr. 451). Dr. Carpenter has estimated the 2,200 feet of road based on the distance shown on a map attached as Figure Six to the engineering section of Hudson Valley's application. At the time the estimate was made, no precise location for the access road had been determined since the estimate was made before Dr. Carpenter visited the antenna site (Tr. 468).

17. Access from Overlook Road to the Vervalin Mountain site requires use of the Sleight's property (Tr. 381, 441). Dutchess principal, Irwin Katz, testified that he has also driven to the Vervalin Mountain site from Vail Road and access via Vail Road would cross land owned by Mr. Frank, who told Mr. Katz that he would be willing to make land available for access to the site (Tr. 153). Mr. Frank told Mr. Katz that he had many substitute routes available for ingress and egress to the site (Tr. 167). From Vail Road to the antenna site, via the Frank property, is approximately 3,000 feet of which half is an old logging road and the other half is cleared plateau area (Tr. 140). The logging road is densely wooded in some areas, but the open plateau needs only to be scraped and graveled for access (Tr. 190-191, 143, 173).

18. The $4,800 estimate for providing power to the intended antenna site is based on a written estimate from Bob Schlegal d/b/a Runt Electric Co., Inc. in Beacon, New York (Dutchess Exhibit 4). Mr. Schlegal has outfitted two radio stations in Beacon, New York and is familiar with the needs of a radio station in terms of electric power (Tr. 380). His estimate

was $1,200 for 500 feet. Dr. Carpenter told Mr. Schlegal that she wanted the estimate for power running from Overlook Road to Vervalin Mountain (Tr. 380) and that the mountain terrain was unimproved (Tr 428). She did not specify any particular route other than the starting and terminal points and she estimated that some 2,000 feet of power line would be required. Dr. Carpenter then arrived at the $4,800 estimate by multiplying the $1,200 for 500 feet figure by four to obtain a figure of $4,800 from Overlook Road to the top of Vervalin Mountain (Tr. 425).

19. Mr. Katz inquired as to the cost of bringing electric power to Vervalin Mountain via Vail Road. He testified that Mr. Wilson, an electrical contractor, had physically surveyed the area and told him that power could be brought to the site at a "very modest" cost (Tr. 147-148, 179). Mr. Katz believes that Mr. Wilson's "very modest" cost opinion was based on 3,000 feet of wire and 14 poles and the required power requirements for the proposed station (Tr. 149, 176, 180).

20. The question of whether Hudson Valley will reach the site via Overlook Road, Vail Road or some other route assumes some importance based on the testimony of Mr. Sleight, the owner of the property between Overlook Road and the Frank property on Vervalin Mountain and Mr. Petrovits, of Blacktop Maintenance Corp., a road construction company.

21. The Presiding Judge must make a legal conclusion at this point to set the following testimony in prospective. It is apparent after hearing the testimony of Mr. Sleight, owner of the access land to reach Vervalin Mountain from Overlook Road, that there never was any meeting of minds between Hudson Valley and Mr. Sleight on the conditions under which he would permit an access road across his land. Mr. Sleight testified that he would require any road built on his land to conform to the town of La Grange highway specifications (Tr. 1962; Harmony Exhibit 30). Mr. Sleight said he would sell such right-of-way across his land for $1 to anyone who would build a town-approved road across it (Tr. 1974). Such a road would be 22 feet wide (Tr. 1924) on a 50-foot right-of-way with a blacktop surface and storm drains, among other requirements (Harmony Exhibit 31, p. 12; Tr. 1920-1922). Mr. Petrovits testified that such a road would run $80 per lineal foot (Tr. 1917) for a total cost of between $240,000 and $320,000 (Tr. 1916). Also, Mr. Sleight would require at further additional cost, monuments and street name signs (Tr. 1922).[4]

22. Based upon an estimate of $71,990 for equipment and initial operation expenses, $35,000 for purchase of the antenna site, $4,800 to provide power to that site, and $3,500 for a gravel access road to the site, Hudson Valley will be required to have a total of $115,290 for construction

[4] It appears that Mr. Sleight plans on retiring as a farmer and developing his farm into a residential community and the Vervalin Mountain access road would be the exit off Overlook Road to his development.

and operation as proposed. To meet those costs, Hudson Valley obtained a loan commitment in the form of a bank letter from Bank East Manchester, New Hampshire for $175,000 (Hudson Valley Exhibit 7). Hudson Valley and its principals have indicated they will comply with the bank's requirements for collateral and personal guarantees (Hudson Valley Exhibit 7; Harmony Exhibits 19 and 20).

Comparative Coverage

23. While this proceeding now involves only two applicants, all four of the original applicants had entered into a stipulation (Joint Stipulation 1; Tr. 224) that the applicants will provide primary aural service (1 mV/m or greater) to essentially identical areas and populations and the availability of other primary service to such areas and populations will be virtually identical. The facts in support of such stipulation are that each of the applicants is proposing maximum height and power as allowed by the Commission for Class A FM stations. Each of its applicants provides a city grade signal (3.16 mV/m or greater) over Poughkeepsie, New York and all the transmitter sites proposed by the applicants in this proceeding are located within approximately three tenths of a mile of each other.

Contingent Comparative Issue

The Applicants

Dutchess Communications Corp.

24. Dutchess is a New York corporation with the following stockholders, officers and directors:

Name of Principal	*Corporate Office*	*Percentage of Voting Stock*
Irwin Katz	President and Director	38%
Kalman Kera	Vice-President, Treasurer and Director	38%
James D. Roosa, Jr.	Vice-President, Secretary and Director	24%

25. *Irwin Katz.* Mr. Katz was born in Brooklyn, New York where he resided through December, 1942, at which time he entered the United States Army (Dutchess Exhibit 2, p. 1). Mr. Katz currently lives in Chappaqua, New York, approximately one hour from Poughkeepsie (Tr. 119). He has never lived in Poughkeepsie and does not intend to move to Poughkeepsie if Dutchess' application is granted (Tr. 114). Mr. Katz also owns a home in Lakeworth, Florida, where he resides part-time during the winter (Tr. 116-117). Mr. Katz plans to continue his part-time residence in Florida if Dutchess' application is granted (Tr. 134).

26. Mr. Katz is currently President of Kayson Chevrolet and is 75% owner of that corporation. He also has a minority ownership interest and is Vice-President of an Oldsmobile dealership near Croton-on-Hudson and owns an interest in an insurance company and a related insurance brokerage business which provides insurance coverage for automobile dealers (Dutchess Exhibit 2, p. 2). Mr. Katz is presently working at Kayson Chevrolet approximately 10 to 20 hours per week (Tr. 116). His son is primarily responsible for managing the dealership. (Dutchess Exhibit 2, p. 4; Tr. 117).

27. Mr. Katz has never been involved in any community activities in the Poughkeepsie area (Tr. 114). He has had no broadcast management experience (Tr. 119) and has no previous or present broadcast interests (Tr. 119).

28. *James D. Roosa, Jr.* Mr. Roosa was born in Ossining, New York, has lived in Chappaqua "virtually all" of his life, and owns a home there (Tr. 208). He has never resided in Poughkeepsie or the Poughkeepsie area (Tr. 197). Mr. Roosa has testified that he would move to Poughkeepsie if Dutchess' application were granted (Dutchess Exhibit 3, p. 4).

29. Mr. Roosa attended Colgate University in Hamilton, New York and New York University in New York City. In 1948 Mr. Roosa took his first position in broadcasting with Station WFAS(AM) in White Plains, New York where he began work as a salesman (Dutchess Exhibit 3, p. 1). He was a retail sales manager, national sales manager, general manager, and, in 1968, President of Stations WFAS and WFAS(FM) (Dutchess Exhibit 3, pp. 1-2; Tr. 2270, 2333). As President of Stations WFAS and WFAS(FM), Mr. Roosa's duties were the same as those held as general manager of those stations (Tr. 2331). Mr. Roosa did not hold an ownership interest in the stations (Dutchess Exhibit 3, p. 2).

30. In April, 1969, Mr. Roosa became Vice-President and general manager of Stations WLNA(AM) and WHUD(FM), Peekskill, New York, a community approximately 30 miles from Poughkeepsie (Dutchess Exhibit 3, p. 2; Tr. 2270). Mr. Roosa's employment at both stations continued until 1979, when he resigned to work for the Johnston Marketing Group, an advertising and public relations business (Dutchess Exhibit 3, p. 2; Tr. 249). In April, 1981, Mr. Roosa became an employee of John K. Smith and Associates (Tr. 205) and left that company in approximately February, 1982 (Tr. 206). Mr. Roosa presently owns and operates an advertising-public relations business, JDR Associates, which places radio, television and magazine advertisements for clients (Tr. 199-200). Mr. Roosa has testified he would disband his public relations business if he "had to" should Dutchess' application be granted (Dutchess Exhibit 3, p. 4; Tr. 203).

31. None of the organizations with which Mr. Roosa is or has been affiliated are Poughkeepsie or Dutchess County organizations, with the exception of the New York Sales and Marketing Executives International (SMEI) (Tr. 198-199). As Vice-President of the New York SMEI, a professional organization for sales people, Mr. Roosa visited the Poughkeepsie chapter several times (Tr. 198-199).

32. As indicated *supra.*, Mr. Roosa has past broadcast experience, much of it at the management level. Mr. Roosa's testimony in this regard was taken while Harmony was still a party applicant in this proceeding. On March 15, 1983, Harmony sought a character issue against Dutchess in connection with Mr. Roosa's claims of past broadcast experience. The issue was denied by *Order* released March 18, 1983. However, in denying the requested character issue, it was noted that the truth and candor of any witness is always in issue.[5] Accordingly, without the addition of the character issue requested by Harmony, Harmony was permitted to explore under the comparative issue, Mr. Roosa's claim of past broadcast experience. On January 25, 1983, Dutchess had exchanged with other parties its Exhibit 3, the written direct testimony of James D. Roosa, Jr. At pages 1-2 of said exhibit, Mr. Roosa made the following representations concerning his employment experience at broadcast stations:

> "In 1948 he took his first job in broadcasting with Station WFAS(AM), White Plains, New York. He began work at the station as a salesman and received promotions to retail sales manager, then national sales manager, then general manager and corporate vice-president, and finally in 1966, he became President of the corporation. He never held an ownership interest in the station."
>
> "In 1970, Mr. Roosa became Vice-President and General Manager of Stations WLNA(AM) and WHUD(FM), Peekskill, New York, which is about 30 miles from Poughkeepsie. His employment at these stations continued until 1979 when he resigned to enter the advertising-public relations business."

33. At the hearing session on February 9, 1983, counsel for Harmony cross-examined Roosa on Dutchess Exhibit 3 and offered into evidence a number of documents represented to be copies of materials filed with the Commission by the licensees of stations where Roosa had worked (Harmony Exhibits 15, 16, 17 and 18; Tr. 221-248). The Harmony Petition to Enlarge Issues had attached to it the affidavit of Harry S. Stone, former stockholder and Chairman of the Board of the licensees of Stations WFAS, AM and FM. This affidavit and other documents taken from radio trade publications appeared to directly contradict the testimony of Mr. Roosa.

34. Harmony produced Mr. Stone as a witness at the hearing session held on March 23, 1983. He testified that he had not prepared the affidavit sent to him by Harmony's counsel which affidavit was attached to the

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[5] *Grenco, Inc.*, 39 FCC 2d 732 (1973); *Rocket Radio, Inc.*, 70 FCC 2d 413 (1977); and *RKO General, Inc.* (WNAC-TV), FCC 80-331, Mimeo 27539, June 6, 1980.

Harmony Petition to Enlarge Issues (Tr. 2045, 2048). Before Mr. Stone received the affidavit for execution, he received a telephone call from Mr. Goldfarb.[6] Mr. Goldfarb identified himself to Mr. Stone in the telephone call as representing a group trying to get a new station and one of their opponents was Roosa and that Goldfarb wished to verify certain information concerning WFAS filed with the Commission (Tr. 2047). That information, as described by Goldfarb, indicated Roosa had not been President or general manager of WFAS (Tr. 2091).

35. Mr. Stone states he told Goldfarb that he had appointed Roosa President and general manager of WFAS in 1968 and that Roosa had both the responsibility and authority to manage WFAS for a period of time thereafter (Tr. 2166, 2168-2169). After the initial telephone call from Goldfarb to Stone, Mr. Stone received the affidavit prepared by Goldfarb for Stone to execute, Stone again spoke with Goldfarb and told him of Mr. Roosa's appointment as President and General Manager of the station. Goldfarb responded to all of this with the view that since Mr. Stone or his station had, never reported Roosa's appointment to the FCC, this information should not be included in the affidavit. Mr. Stone then executed the affidavit believing it was correct since it conformed to the matters reported to the FCC (Tr. 2166-2168). At this point, it may be concluded that with Mr. Stone's testimony and the Stone affidavit as attached to the Harmony Petition to Enlarge Issues is completely discounted and any Harmony challenge to Mr. Roosa's past broadcast experience is rejected. This is further supported by Dutchess Exhibit 9 which contains a copy of the letter from Mr. Stone to Mr. Roosa which appointed him President of Station WFAS, AM and FM.[7] Accordingly, the broadcast experience as claimed in Dutchess Exhibit 3 will receive credit for comparative purposes.

Hudson Valley Communications Company

36. Hudson Valley is a partnership composed of the following individuals:

[6] In the transmittal letter with the affidavit, Goldfarb represented that he was a "Legal Assistant" for the law firm representing Harmony (Dutchess Exhibit 13, p. 1).

[7] Since Harmony is no longer a party applicant in this proceeding, further consideration of this matter is moot.

Name of Partner	*Percentage of Partnership Interest*
James A. Finley	31%
Karen Marie Carpenter	19%
Ann Marie Carpenter	19%
Laura J. Finley	31%*

*There was some confusion in the record as to the rights of the four partners concerning their right to vote their interests (Tr. 755, 757). However, on redirect, Laura J. Finley testified that partners are entitled to vote in proportion to their ownership interest.

(Hudson Valley Exhibit 1)

37. All of the partners of Hudson Valley are Black Americans. Karen Marie Carpenter, Ann Marie Carpenter and Laura J. Finley are females (Hudson Valley Exhibit 1). James and Laura Finley are husband and wife and Karen Marie Carpenter is the daughter of Ann Marie Carpenter (Tr. 915).

38. *James A. Finley.* Mr. Finley was born in Abbyville County, South Carolina where he lived until 1960 when he moved to New York City. Mr. Finley is presently a resident of Springfield Gardens, New York but will move to Poughkeepsie prior to commencement of operation if Hudson Valley's application for a proposed new FM station is granted (Hudson Valley Exhibit 4, p. 1 Tr. 494).

39. Mr. Finley attended the South Carolina Area Trade School from which he received a certificate in radio repair in 1960. Mr. Finley also received a Bachelor of Science Degree in Criminal Justice and Behavioral Science from the New York Institute at Westbury, Long Island (Hudson Valley Exhibit 4, p. 1).

40. Since 1970, Mr. Finley has been employed by the New York City Department of Corrections as a corrections officer and he is in charge of the medical facility (Adolescent Division) at the Rikers Island Correctional Facility (Hudson Valley Exhibit 4, p. 1). Mr. Finley has had no prior broadcast experience (Tr. 501) and has no interest or connection with any broadcast station or other mass media (Hudson Valley Exhibit 4, p. 2). Mr. Finley has not been a member of Poughkeepsie civic organizations (Tr. 496).

41. *Karen Marie Carpenter.* Ms. Carpenter was born in New York City, New York, where she resided until 1965, at which time she moved to Teaneck, New Jersey. In May, 1982, Ms. Carpenter moved to Brooklyn, New York where she currently resides (Hudson Valley Exhibit 6, p. 1; Tr. 915). If Hudson Valley's application is granted, Ms. Carpenter will move to Poughkeepsie (Hudson Valley Exhibit 6, p. 1).

42. Ms. Carpenter attended Tufts University in Medford, Massachusetts from which she was awarded a Bachelor of Arts Degree in Spanish, Magna Cum Laude, in May, 1980. From September, 1979 to December, 1979, Ms. Carpenter attended the Universidad de Barcelona, in Barcelona, Spain (Hudson Valley Exhibit 6, p. 1). During the academic years of 1977 to 1979, Ms. Carpenter served as editor of the Tufts African American Center newsletter, supervising a staff of approximately seven students (Hudson Valley Exhibit 6, p. 3). From January, 1981 to February, 1982, Ms. Carpenter was employed by the Technical Publishing Company in New York City as a promotion assistant (Hudson Valley Exhibit 6, p. 2). Ms. Carpenter is presently employed by the Floating Hospital in New York, New York (Hudson Valley Exhibit 6, p. 2; Tr. 897). She plans to move to Poughkeepsie if Hudson Valley's application is granted (Hudson Valley Exhibit 6, p. 3).

43. *Ann Marie Carpenter.* Dr. Carpenter was born in New York, New York where she lived until 1965, when she moved to Teaneck, New Jersey. Dr. Carpenter resided in Teaneck for 15 years, but moved to Englewood, New Jersey in September, 1981 and presently resides there. In the event Hudson Valley's application is granted, Dr. Carpenter will move to Poughkeepsie (Hudson Valley Exhibit 3, p. 1).

44. Dr. Carpenter attended primary, secondary and undergraduate schools in New York City. She holds a Bachelor of Science Degree in Education and a Master of Arts Degree in English from the City College of New York. Dr. Carpenter holds a Doctor of Chiropractic degree from the New York Chiropractic College as well as a Masters Degree in Clinical Nutrition from the University of Bridgeport, Connecticut (Hudson Valley Exhibit 3, pp. 1-2). Dr. Carpenter has also reached the level of candidate status for a Ph.D in Media Ecology, a program in mass media studies at New York University (Hudson Valley Exhibit 3, p. 1).

45. During the past 20 years, Dr. Carpenter has worked as a professional educator and has been a teacher in various levels from junior high school through college. She is presently self-employed as a chiropractor (Hudson Valley Exhibit 3, pp. 1-2).

46. Dr. Carpenter's civic activities in the Dutchess County area include a month-long series of lectures on nutrition conducted in April, 1981 at the Star of Bethlehem Church in Beacon, New York. Dr. Carpenter has contributed to various Dutchess County and Poughkeepsie charitable and benevolent organizations, including the Poughkeepsie Policemen's Benevolent Association and the Dutchess County Sheriff's Spring 1982 Fundraising Drive for underprivileged children (Hudson Valley Exhibit 3, pp. 2-3).

47. Dr. Carpenter has had no prior experience in broadcasting (Tr. 365) and holds no media interests (Hudson Valley Exhibit 3, p. 3).

48. *Laura Finley.* Mrs. Finley was born in Greenville, South Carolina where she resided until 1961, at which time she moved to New York City. Mrs. Finley has resided in New York City since that time and currently resides in Springfield Gardens, New York. If Hudson Valley's application is granted, Mrs. Finley will move to Poughkeepsie, New York (Hudson Valley Exhibit 5, p. 1).

49. Mrs. Finley attended Benedict College in Columbia, South Carolina for two years and Hunter College in New York City for one year. She was a day care teacher for ten years, from 1961 to 1971, and has been a homemaker since 1971 (Hudson Valley Exhibit 5, p. 1).

50. Mrs. Finley has never been employed in broadcasting (Tr. 770) and holds no interests in any broadcast station or media of mass communications (Hudson Valley Exhibit 5, p. 2).

Integration of Ownership in Station Operation

Dutchess Communications Corp.

51. *James D. Roosa, Jr.* Mr. Roosa proposes to work "a minimum of 40 hours per week" as general manager of the proposed station (Dutchess Exhibit 3, p. 4; Tr. 209). Mr. Roosa's activities would include management of personnel, assisting Mr. Katz in planning and implementing sales and promotional activities, and production of all programming (Dutchess Exhibit 3, p. 4).

52. *Irwin Katz.* Mr. Katz states he will work at the proposed station daily and will devote a minimum of 20 hours per week to his activities as "financial manager" and sales manager of the proposed station (Tr. 118-119). In that capacity, Mr. Katz would design, plan and implement sales and marketing, supervise sales staff, and participate directly in sales and marketing activities of the proposed station (Dutchess Exhibit 2, p. 5; Tr. 135). Mr. Katz has never been the sales or financial manager of a broadcast station or held any other management position at a broadcast station (Tr. 119). Mr. Katz testified that his position as chief executive officer of Dutchess would include the direction, operation and oversight of Dutchess (Tr. 131).

53. Mr. Katz testified that he will not become a resident of Poughkeepsie if Dutchess' application is granted (Tr. 114, 119). He will commute to the Poughkeepsie station from Chappaqua, approximately one hour from Poughkeepsie (Tr. 119). Mr. Katz also resides part-time in Florida and owns a home there (Tr. 116-117). He leaves for Florida on Thursday night and arrives back in New York on Monday morning during the winter season (Tr. 117). Mr. Katz will also continue residing in Florida three days per week during the winter while working at the proposed station (Tr. 134). Mr. Katz has never resided in Poughkeepsie or been involved in any community activities in the Poughkeepsie area (Tr. 114).

Hudson Valley Communications Company

54. *James A. Finley.* Mr. Finley (31% partner) will serve as full-time general manager of the proposed station, responsible for all areas of station operation. He will work closely with Laura Finley, program director, to coordinate programming; Karen Carpenter, sales director, to coordinate sales efforts; and Ann Carpenter, public affairs director, to coordinate community involvement and public affairs programming. Mr. Finley will have primary responsibility for the financial management of the station and compliance with FCC rules (Hudson Valley Exhibit 4, p. 2).

55. As a Black American, Mr. Finley proposes to take an active role in minority programming, working closely with the station's programming staff and actively participating in public affairs programming designed to be responsive to the needs of the Poughkeepsie area's extensive minority population. Mr. Finley hopes to ensure that programming will promote harmony between different races and ethnic backgrounds (Hudson Valley Exhibit 4, pp. 2-3).

56. *Karen Marie Carpenter.* Ms. Carpenter (19% partner) proposes to serve as full-time sales manager of the Poughkeepsie station. Ms. Carpenter would work closely with Laura Finley, program director of the station, to coordinate programming and sales efforts. She would be responsible for the day-to-day supervision of salespeople, the sale of advertising time, and the development of marketing and promotional efforts. Ms. Carpenter also would confer on a regular basis with Mr. Finley, the general manager, and work with the staff to ensure that the station's programming responds to the needs of the Poughkeepsie community (Hudson Valley Exhibit 6, pp. 3-4).

57. *Ann Marie Carpenter.* Dr. Carpenter (19% partner) would work on a part-time basis of no less than 20 hours per week as public affairs director of the Poughkeepsie station. Dr. Carpenter would be available on Wednesdays and weekends to conduct interviews with local and regional celebrities as well as to organize a regularly presented talk show featuring "call-ins" from the listening audience. As public affairs director, Dr. Carpenter would work closely with James Finley, general manager of the station, and confer with him regularly with regard to management and operation of the station. As a Black American, Dr. Carpenter plans to organize public affairs programming which responds to the needs and interests of the Black and Hispanic residents of the Poughkeepsie area. Dr. Carpenter plans to work closely with local leaders to ensure that the station's programming will meet those needs (Hudson Valley Exhibit 3, pp. 3-4).

58. *Laura J. Finley.* Mrs. Finley (31% partner) proposes to work full-time at the proposed station as program director. Mrs. Finley will plan daily programming and ensure that all production work is completed on

time. Mrs. Finley will be primarily responsible for ascertaining community problems and, with the advice of the general manager and public affairs director, assist in the production of responsive programming (Hudson Valley Exhibit 5, p. 2).

59. As a female Black American, Mrs. Finley plans to provide programming to meet the needs of the extensive Black, Hispanic and female population within the proposed station's service area. Such programming would include public affairs programming as well as entertainment programming, providing music geared to the area's minority population that may not presently be available on other local stations (Hudson Valley Exhibit 5, p. 2).

Conclusions of Law

1. Dutchess and Hudson Valley each seek a construction permit for a new FM station to be operated on Channel 221A at Poughkeepsie, New York. The *Designation Order* specified an air navigation hazard issue as to Hudson Valley. That issue has been resolved favorably to Hudson Valley by a partial summary decision. Also, the *Designation Order* contained a Section 307(b) issue which has been mooted by the dismissal of the only non-Poughkeepsie applicant, Wappingers Falls. Accordingly, the only issues remaining for resolution are the comparative issue, a site suitability issue against both Hudson Valley and Dutchess and a limited financial issue against Hudson Valley. The latter two issues, which concern the basic and/or comparative qualifications of the applicants, will be examined first, followed by analysis of the comparative coverage and comparative issues.

Site Suitability Issue

2. This site suitability issue was added pursuant to a Motion to Enlarge Issues filed by Harmony. The issue deals with whether Hudson Valley and Dutchess can use the Vervalin Mountain site as proposed by both applicants in terms of the physical characteristics for the intended use. Harmony had the burden of proceeding and the two applicants, Hudson Valley and Dutchess, bear the burden of proof on that issue. *Memorandum Opinion and Order*, FCC 82M-3771, released November 29, 1982. The Presiding Judge ruled that "[t]he accessibility issue is only in terms of the physical ability to get to this mountain top by whatever means are required." (Tr. 168).

3. What little evidence Harmony presented on this issue is unconvincing. Harmony did establish, and it is not disputed by either Hudson Valley or Dutchess, that at present there are no roads going to or near the Vervalin Mountain site. Likewise, there presently is no electric power to or near that site. The record shows that the Vervalin Mountain site is now accessible both by foot and by four-wheel drive vehicle and that the slope

of the mountain is not so steep as to impede accessibility. Testimony shows that from a physical standpoint, the Vervalin Mountain site is accessible from at least two directions - from Overlook Road and from Vail Road. At the present time, there is an unimproved "logging road" from Vail Road halfway to the transmitter site. Based upon Mr. Katz's testimony, it appears that a road can be built from Vail Road which will require only rough grading and install a gravel road some 12 to 18 feet wide. All that is required under the issue is a demonstration of reasonable means of access to the site. This can be done by means of the utility-type construction of a private road intended to serve the requirements of the antenna site and not a public highway as envisioned by Mr. Sleight and Mr. Petrovits that would be built to county or township specifications intended to serve a new community. It is concluded, from a purely physical standpoint, that an access road capable of accommodating the needs of the transmitter atop of Vervalin Mountain can be constructed from either Overlook Road or Vail Road. The record shows that building the required access road from either of the existing roads to the transmitter presents no problem. The mountain can now be scaled in its present unimproved condition by a four-wheel drive vehicle. From a realistic and practical standpoint, the only access to the transmitter site is via Vail Road. Based on the testimony of Mr. Sleight and Mr. Petrovits, it appears that Mr. Sleight either is or is about to become a retired farmer and plans to now subdivide all or part of his farm into a housing development and is looking for someone, without cost to him, to build a county-approved public highway from Overlook Road to the site of the proposed development. Mr. Sleight's conditions for use of his land to gain access to the Vervalin Mountain antenna site first came to light at the hearing and had not been previously discussed with Hudson Valley. Thus, while physical access to the transmitter site is easily available from Overlook Road via the Sleight land, the conditions imposed by Mr. Sleight effectively remove from further consideration any access to the site via Overlook Road. Mr. Frank, who owns the Vervalin Mountain antenna site also owns land which abuts Vail Road. He has indicated that his land is for sale and that there are several acceptable areas for ingress and egress to the mountain and the proposed antenna site.

4. The record also shows that electric power is presently available from both Overlook and Vail Roads. An electrical contractor who had physically surveyed and measured the area assured Mr. Katz that power could be brought to the Vervalin Mountain "at a very modest cost". Dr. Carpenter has an estimate for running a power line from Overlook Road to the Vervalin Mountain site. While the approach to the site from Overlook Road is no longer possible due to the unrealistic conditions placed by Mr. Sleight on use of his land, there is nothing in the record

which would indicate that providing power from Vail Road to the transmitter site either would be difficult, more costly or different in any material respect than from Overlook Road.

5. It is concluded that both Dutchess and Hudson Valley have satisfied their burden of proof on the issue of site accessibility or suitability. The record shows that the Vervalin Mountain site is accessible and suitable for use as a transmitter site. Therefore, this potentially disqualifying issue against Dutchess and Hudson Valley is resolved in their favor and no comparative disadvantage will accrue to either applicant.

The Financial Issue

6. The financial issue against Hudson Valley is a narrow one — does Hudson Valley have the financial qualifications to purchase the proposed Vervalin Mountain site and to make that site ready for its intended use. *Memorandum Opinion and Order,* FCC 82M-3771, released November 29, 1982. The record shows that Hudson Valley is financially qualified.

7. The Vervalin Mountain site on which Hudson Valley plans to build its transmitter can be purchased for approximately $35,000, based upon an August 27, 1982 affidavit of Henry Frank, owner of the land, filed in this proceeding and relied on by Hudson Valley. There is no evidence to indicate that this is not a reasonable cost estimate. Dr. Carpenter, testifying for Hudson Valley, stated that she believed the $35,000 figure to be correct because it is in "the records of the FCC." (Tr. 374). Dr. Carpenter stated she was speaking about "the testimony of the Frank brothers who said that . . . they would sell their property for from 30,000 to 35,000 dollars." (Tr. 374). Further, Dr. Carpenter testified that the basis for her belief that the Frank brothers would sell the property to Hudson Valley was a statement made by the Frank brothers in 1981 to Mr. Moore, who had checked into ownership of the property for Hudson Valley (Tr. 375-378).

8. Two factors are involved in making the site suitable. They are construction of the access road to Vervalin Mountain and running electric power to the site from power lines presently located along both Overlook and Vail Roads.

9. Dr. Carpenter had obtained access to the Vervalin Mountain site through land owned by the Sleights, after receiving permission from the Sleights to cross that land. The Sleights also told Dr. Carpenter the land would be available for purchase. From a physical standpoint, the Vervalin Mountain site was reasonably accessible and available from the Sleight's land, and she chose that route, i.e., via Overlook Road and based her estimates for electricity and road construction on that route. The exact route of the road and power line was never specified.

10. Harmony presented testimony by Mr. Sleight to the effect that access to Vervalin Mountain across his land would be available to anyone who would build a public road at a cost of $240,000 to $320,000. It is inconceivable that anyone would purchase land on this basis to access the broadcast transmitter as here proposed, particularly when other land was available. Mr. Sleight's demand, first presented at the hearing, that a 22-foot wide hardtop road, complete with storm drains and road signs be built over the unimproved Vervalin Mountain land was plainly unforeseeable by Hudson Valley and does not undercut the reasonableness of Dr. Carpenter's choice of access routes or her estimate for accessing the site. An applicant's estimate need only be reasonable. See *Sampson Broadcasting Co., Inc.*, 52 FCC 2d 954 (1975); *Dubois County Broadcasting*, 53 FCC 2d 828 (1975). See also, *NR Recording and Communications, Inc.*, 87 FCC 2d 469, 471 (1981) where estimates as to land value widely differ, making it difficult to accurately determine value, still financial showing is adequate if evaluation does not appear unreasonable.

11. A professional road contractor estimated the cost to provide a 12-foot wide gravel road up the unimproved Vervalin Mountain as $1 per foot for open areas and $7 per foot for heavily wooded areas. That estimate included labor and materials. On this basis, Dr. Carpenter made a reasoned approximation of the access road required as 2,000, based upon a map of the Vervalin Mountain and her own traversing of the area. Further, based on Dr. Carpenter's personal inspection, she estimated the area of 200 feet as heavily wooded which was used to produce her estimate of $3,500 for installation of the road ($7/foot $\times$ 200 feet = $1,400 plus $1/foot $\times$ 1,800 feet = $1,800 for a total of $3,400). There is no evidence that the estimate is not a reasonable one.

12. Dr. Carpenter's estimate for providing electrical power to the summit was likewise reasonable. She had the estimate from an electrical contractor who was familiar with the needs of radio stations and that the estimate was for providing power over unimproved Vervalin Mountain terrain, via Overlook Road, was $1,200 for 500 feet. Dr. Carpenter then again applied her 2,000 foot estimate and arrived at an estimate of $4,800. There is no evidence to indicate that this estimate was unreasonable.

13. Accordingly, Hudson Valley estimated the cost of purchasing the proposed transmitter site, installing a road and power to the site as $43,300 ($35,000 + $3,500 + $4,800 = $43,300). Added to the estimated $71,990 proposed for construction and operating the proposed station for three months, Hudson Valley's total estimated cost would be $115,290.

14. It is clear from the record that Dr. Carpenter obtained and computed her estimates on the assumption that Hudson Valley would likely access the transmitter site via Overlook Road and the Sleight land. Clearly the Sleight land is no longer available in any realistic sense.

However, no substantial difference has been shown in the terrain to be crossed from either Overlook Road or Vail Road based on the description of the approach to the Vervalin Mountain site from Vail Road described by Mr. Katz. In fact, Mr. Katz described an old "logging road" in place from Vail Road. In this connection, a presumption can be made with respect to the Frank brothers ownership of the antenna site on top of the mountain. There is no question of their willingness to sell that site for 30 to 35 thousand dollars and it cannot be presumed that this price refers only to a landlocked piece of property, particularly when the Frank brothers already own land which would provide access to Vail Road. Utilization of the alternate route would not affect Hudson Valley's financial qualifications. The Commission has recognized that a proposed operation "is rarely effectuated exactly as itemized" in an application, *Revision of Form 301*, 55 RR 2d 381, 382 (1981).

15. Mr. Katz on behalf of Dutchess testified as to access to the transmitter via Vail Road. He estimated a total of 3,000 feet of road would be required - 1,500 feet of densely wooded area and 1,500 feet of cleared plateau. If Dr. Carpenter's estimate is applied, the 12-foot wide gravel road would be $12,000 ($7/foot $\times$ 1,500 feet = $10,500 plus $1/foot $\times$ 1,500 feet = $1,500). This higher estimate would not adversely affect Hudson Valley's financial qualifications. Likewise, the electric power estimate would increase to $7,200 to reflect the additional 1,000 feet estimated by Mr. Katz from Vail Road to the transmitter site. Thus, by transferring the Hudson Valley estimates for access via Overlook Road to access via Vail Road which requires an access road of 3,000 feet instead of 2,000, the total cost for purchase of the Frank brothers transmitter site, installing an access road and power from Vail Road would be $54,200 ($35,000 + $12,000 + $7,200 = $54,200). Adding the estimated $71,990 for construction and operating the proposed station for three months, Hudson Valley's proposed estimate would be increased from $115,290 to $126,190.

16. Whether the estimate is $115,290 or $126,190, Hudson Valley is financially qualified to purchase its proposed transmitter site and make it ready for its intended use. Bank East has indicated its willingness to lend $175,000 to Hudson Valley. That amount will more than cover the estimated costs of constructing and operating the proposed station for three months. Where the applicant has funds available which more than cover its estimated costs, there is no question that it is financially qualified. See *Hassayampa Broadcasting*, 92 FCC 2d 472, 473-474 (Rev. Bd. 1982).

17. The above conclusions reflect the findings of fact based upon the limited financial issue added against Hudson Valley. Dutchess[8] would conclude that Hudson Valley should be disqualified for lack of financial

[8] Harmony also took this position while it was a party in this proceeding.

qualifications. The proposed Dutchess conclusions of Hudson Valley's lack of financial qualifications have no merit and the four basic arguments in support of the Dutchess position are considered below.

18. Dutchess contends that Hudson Valley had no "reasonable assurance" of the availability of funds to construct and operate as proposed when it certified to the Commission that it was financially qualified (Dutchess Proposed Findings, p. 40, paras. 1-2). It is the position of Dutchess that Hudson Valley filed its financial certification without having any letter from Dr. Smith, the original source of its proposed financing. Accordingly, Dutchess would conclude that Hudson Valley made intentional and material misrepresentations to the Commission (Dutchess Proposed Findings, p. 41, para. 2).

19. There is no record support for the conclusion sought by Dutchess that Hudson Valley had no letter of commitment from Dr. Smith at the time of certification. The only record testimony cited by Dutchess is the fact that Dr. Smith went to a bank for a loan commitment letter several months before the hearing, and subsequent to designation of the limited financial issue and discovered that the bank would require a loan commitment fee for that letter. Whether Dr. Smith was seeking an updated bank letter in view of the issue is unknown, but, such facts do not establish that there was no bank letter at the time of the original certification.

20. In like manner, Dutchess urges that the record shows that Hudson Valley obtained a bank letter from Bank East because of a condition imposed by Dr. Smith's bank. There was no condition of the type suggested by Dutchess, i.e., a bank condition that Dr. Smith could not meet. Clearly the condition was the bank's requirement of a commitment fee which Hudson Valley decided was unacceptable and Hudson Valley decided to seek a loan from a bank which did not require a commitment fee. The record is clear on this point (Tr. 389).

21. It is the view of Dutchess that even though no misrepresentation issue was added against Hudson Valley, disqualification without addition is appropriate citing *Rocket Radio, Inc.*, 65 FCC 2d 589 (Rev. Bd. 1977) and *United Broadcasting Co., (KBAY-FM)*, 53 RR 2d 57, 81, n. 121 (1983). In *Rocket Radio*, a financial issue had been designated against an applicant and the applicant introduced testimony that certain funds were on deposit with the applicant's bank. The record in *Rocket Radio* revealed the funds alleged to be on deposit were not in fact deposited for many months after that date. Under those circumstances, the Review Board disqualified an applicant in *Rocket Radio* even though the misrepresentation issue had not been designated. Further, it was held that by the issues designated against the applicant, that its financial representations were being challenged and the applicant had adequate notice to respond to the

challenge. Such is not the case with Dutchess' misrepresentation charge. There was only a limited financial issue against Hudson Valley and certification was not part of that issue and the question of misrepresentation on the Hudson Valley certification were not raised at the hearing. Accordingly, *Rocket Radio* does not apply and as pointed out, *supra.*, Dutchess has never established that Hudson Valley did not have a bank commitment at the time of Hudson Valley's original certification. The *United Broadcasting Co.* case also cited by Dutchess is not in point. *United* does refer to *Rocket Radio* but the reference has no relationship to the proposition that a misrepresentation issue need not be formally designated.

22. Next, Dutchess asserts that Hudson Valley failed to demonstrate a "reasonable assurance" that it will receive the proposed loan from Bank East because the bank letter (the January 14, 1983 Bank East letter) does not specify what acceptable collateral may be and does not indicate that the assets of Hudson Valley's principals would be "acceptable" to the bank as collateral (Dutchess Proposed Findings, pp. 43-44). This claim is rejected. Bank commitment letters traditionally have been accepted as evidence of reasonable assurance of the applicant's financial qualifications "absent a showing which questions the validity of the letter or the bank's ability to make the loan." *Jay Sadow*, 39 FCC 2d 808, 810 (Rev. Bd. 1973). See also *The New Continental Broadcasting Company*, 88 FCC 2d 830, 836 (Rev. Bd. 1981); *Crosby N. Boyd*, 57 FCC 2d 475 (1976); and *Deep South Radio, Inc.*, 47 FCC 2d 1045, 1049 (Rev. Bd. 1974). If the contingencies in a bank letter were considered to negate a finding that an applicant is financially qualified, then Dutchess is urging the test be a firm or legally binding commitment instead of the "reasonable assurance" test. "Reasonable assurance" is the test. See *Multi-State Communications, Inc.* v. *FCC*, 590 F. 2d 1119 (D.C. Cir. 1978) and *Las Vegas Valley Broadcasting Co.* v. *FCC*, 589 F. 2d 594, 601 (D.C. Cir. 1978), *cert denied*, 441 US 931 (1979).

23. Dutchess cites other case authority which can be distinguished from the instant case. Dutchess cites *Montgomery County Broadcast Company, Inc.*, 89 FCC 2d 1327 (1982) where the Commission added a financial issue against an applicant which had attempted to establish financial qualifications on the basis of loan commitments from its four principals. Thus, no bank letter was involved. The financial statements of two of the four principals showed insufficient assets to meet their share of the commitment. Dutchess has not challenged Bank East's ability to make the loan. Dutchess also cites *Chapman Radio and Television Co.*, 70 FCC 2d 2063 (1979) and Dutchess asserts, "the evidence relating to the Bank East loan proposal is strikingly similar to that which served as the basis for the Commission denial of an application for failure to demon-

strate financial qualifications . . ." (Dutchess Proposed Findings, p. 44, para. 6). In *Chapman*, the loan commitment letters relied on by the applicant were 11 years old and had been executed by a predecessor bank. Further, two officials of the bank were deposed and expressed doubts as to whether the 11-year old commitments made by a predecessor bank would be honored. *Chapman*, 70 FCC 2d at 2070. The *Chapman* case also cites with approval the general practice of accepting bank commitment letters as reasonable assurance of financial qualifications unless there is some question as to the validity of the letter or the ability of the bank to make the loan. No such misgivings are evident with respect to the Bank East loan commitment.

24. Lastly, Dutchess cites cases involving cellular radio, namely: *Cellular Communications of Cincinnati, Inc.*, 53 RR 2d 827, 830 (Common Carrier Bur. 1983); *GTE Mobilnet of Portland, Inc.*, 53 RR 2d 1490, 1496 (Common Carrier Bur. 1983); and *Advanced Mobile Phone Service, Inc. (Philadelphia)*, 52 RR 2d 1593, 1596-1597 (Common Carrier Bur. 1983) (Dutchess Proposed Findings, pp. 44-45, fn. 13).

25. In *Cellular*, the Commission distinguished *Multi-State, supra.*, on the basis that while the bank letter in *Multi-State* contained general terms of the loan, no terms whatsoever were presented by them in this case. *Cellular supra.*, at 830, n. 3. Likewise, the loan commitment in *Advanced Mobile Phone* was devoid of terms of the proposed loan. Moreover, that letter had provided that funding would come from a "consortium of various financial and lending institutions", without identification of these institutions or inclusion of commitment letters from those institutions. In *GTE*, the letter submitted was a letter of reference, not a letter of commitment. That letter made no mention of a loan or even the availability of funds.

26. Dutchess seeks to examine factors beyond the loan commitment letter itself and this is not warranted. Thus, the personal finances of Hudson Valley partners are not a proper focus of examination. No reason has been shown to go beyond the terms of the Bank East letter or second-guess the judgment of the bank in issuing the letter. *Jay Sadow, supra.*

27. Dutchess alleges that the bank letter (Bank East) was issued without knowledge of the financial condition of Hudson Valley or its principals. There is no record support for this. Dr. Carpenter testified that Bank East's letter was sent "as a result of discussions that were conducted about [Hudson Valley's] loan application" (Tr. 337, 338).

28. Next, Dutchess seeks to attack Hudson Valley's estimates of cost under the financial issue, because it is alleged that Hudson Valley failed to adequately demonstrate the costs of constructing and operating its proposed station. Dutchess points out that Hudson Valley proposed access via Overlook Road which under the conditions imposed by Mr. Sleight

would cost $240,000 to $320,000. This cost alone is greater than the total funds available to Hudson Valley. In the alternative, urges Dutchess, if Hudson Valley proposed the same access to the site as Dutchess, i.e., via Vail Road, then there is no record evidence of such costs (Dutchess Proposed Findings, p. 42, para. 4).

29. Without question, any access to the transmitter site via Overlook Road and use of Mr. Sleight's property is subject to such extreme conditions as to render use of this route of access impossible. But it is clear that the Frank brothers own the Vervalin Mountain site proposed by both Dutchess and Hudson Valley. The site is for sale and the Frank brothers can provide an access road to the site via Vail Road. It is a valid presumption that the Frank brothers are not selling land-locked property and will provide access to either applicant to the common antenna site. The record is also clear that the estimates provided by Dr. Carpenter in this record for the necessary access road and power lines related to the Overlook Road route. However, the estimates received by Dr. Carpenter are for a power line and road over unimproved land to the Vervalin Mountain summit. Further, Dr. Carpenter's estimates were based upon distance (2,000 feet) rather than a particular route. There has been no showing why Hudson Valley cannot properly convert its estimates based upon distance, rather than a particular route, to the access via Vail Road instead of Overlook Road as Hudson Valley has done, making such adjustments as required to provide for 3,000 feet of road and power line instead of 2,000 feet. While the Hudson Valley conversion of its estimates from the Vail Road access to its site may not meet a textbook evidentiary test, Hudson Valley is found to have demonstrated both its ability to use the Vail Road access and to have made a reasonable and acceptable estimate of the added costs connected with the additional 1,000 feet of road and power line from the Vail Road site, particularly when Hudson Valley learned of Mr. Sleight's unusual and impossible conditions for the first time at the hearing.

30. Lastly, it is necessary to deal briefly with the scope of the financial issue in this case since both Dutchess and Harmony, while it was a party applicant, attempted to go beyond the narrow financial issue and examine all aspects of Hudson Valley's financial qualifications such as the equipment leasing agreement, estimates for legal fees and salaries and personal assets of Hudson Valley principals. These attempts are rejected. Dutchess sought a full general financial issue against Hudson Valley and the general financial issue was denied by *Memorandum Opinion and Order*, FCC 82M-3771, released November 29, 1982, wherein only a limited financial issue was added against Hudson Valley of the financial qualifications to make the transmitter site ready for its intended use. Harmony also requested a general financial issue in a Petition to Enlarge

Issues filed August 30, 1982. The following discussion reflects the disposition of that request:

> Mr. Boros: Of course, I think we asked for general financial issue. In fact, we did ask for a general financial issue.
>
> Judge Harrison: And you didn't get it
>
> (Tr. 371)

Thus, in response to attempts to explore the basis for Hudson Valley's estimate of costs to construct and operate the proposed station, the Presiding Judge repeatedly ruled that there could be no inquiry into these component costs since there was no added cost justification issue (Tr. 370, 373). "The appropriate procedure is to request consideration of matters not within the designated issues in the filing of a Petition to Enlarge or Modify Issues." *WHCN, Inc.*, 28 FCC 2d 734 (1971). Neither Dutchess nor Harmony sought to enlarge or modify the limited financial issue by appropriate petition. Absent a proper request to enlarge or modify issues, consideration of matters beyond the scope of the designated issue is not warranted. Particularly is this true with respect to financial issues. "[T]he Commission has followed a practice of delineating financial issues with particularity, directing them solely to the financial question raised in the application." (*SRC, Inc.*, 11 FCC 2d 537, 539 (Rev. Bd. 1968)). Also see *Charles W. Holt*, 37 FCC 2d 64, 66 (Rev. Bd. 1972); and *Rovan Television, Inc.*, 8 FCC 2d 640 (Rev. Bd. 1967).[9]

31. The Dutchess argument that Hudson Valley's failure to further amend its application after the Commission's ruling in *South Florida Broadcasting Co., Inc.*, 53 RR 2d 1683 (1983) opens up all aspects of Hudson Valley's financial qualifications is rejected. That decision focused upon applicants relying solely upon a certification of financial qualifications. Hudson Valley is not in that group. On January 20, 1983, Hudson Valley amended its application to include a letter evidencing a commitment from Bank East to lend Hudson Valley $175,000. That amendment was accepted by *Order*, FCC 83M-458, released February 7, 1983.

32. In summary, Hudson Valley is found to be financially qualified to construct and operate its proposed station for three months. The arguments made by Dutchess and Harmony are rejected and Hudson Valley is entitled to receive comparison under the standard comparative issue.

Comparative Coverage

33. The applicants propose to locate their transmitter sites within .3 mile of each other and will each operate with maximum facilities.

[9] Dutchess' reliance on such cases as *GACO Communications Corp.*, 54 RR 2d 77 (Rev. Bd. 1983) is misplaced. The case deals with broad financial issues having no relevance to the limited financial issue designated against Hudson Valley.

Therefore, there is no decisionally significant difference between their coverage proposals.

The Comparative Issue

34. Dutchess[10] chose not to compare itself with Hudson Valley under the comparative issue. In effect, Dutchess is relying on the absolute disqualification of Hudson Valley under the limited financial issue as Dutchess sought to interpret and expand the issue. However, this issue was resolved favorable to Hudson Valley.

35. In its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the Commission set forth two primary objectives to be considered in comparing applicants: "They are, first, the best practicable service to the public, and, second a maximum diffusion of control of the media of mass communications." *Id.* at 394. The Commission considers diversification as "a factor of primary significance." *Id.*

Diversity of Control of Mass Media

36. Under the media diversification criterion, the number and degree of ownership interests as well as the location of the other media interests are important considerations. *Policy Statement*, 1 FCC at 394, 395. In the absence of significant countervailing considerations, numerical differences in regard to these factors may provide the basis for a preference. *Berryville Broadcasting Company*, 70 FCC 2d 1, 14-15 (Rev. Bd. 1978).

37. None of the principals of Dutchess have interests in other broadcast stations. Mr. James Roosa, a 24% owner of Dutchess, does presently own and operate an advertising public relations business, JDR Associates, which handles advertising for several firms, placing radio, television and magazine advertisements for those firms. JDR Associates has placed radio time on New York stations which are not far from Poughkeepsie, including WVIP-FM in Mt. Kosco, WHUD in Peekskill, and WBRN in Beacon, New York. The Beacon station is only 15 miles from the city of Poughkeepsie. Mr. Roosa designs marketing plans and specifics upon which station advertisements should be run. Thus, Mr. Roosa does have a controlling interest in a business intimately related to the mass communications media. Ownership of an advertising agency which placed advertisements on stations in the area of the proposed station is considered relevant to the issue of diversification. *Berryville, supra.*, at p. 15. See also *Mid-Florida Television Corporation*, 69 FCC 2d 607, 649 (Rev. Bd. 1978).

38. Mr. Roosa did testify that he would disband his public relations business "if he had to". However, an applicant may not improve its

[10] Harmony took the same position with respect to Hudson Valley and compared itself only to Dutchess.

comparative position with respect to diversification after the expiration of the time for filing amendments as a matter of right. *Muncie Broadcasting Corporation*, 89 FCC 2d 123, 129 (Rev. Bd. 1982). Accordingly, Mr. Roosa's ownership of JDR Associates must be credited to him under the diversification of media issue. None of the principals of Hudson Valley have any interests in or connected with any broadcast interest as any other media of mass communication. Hudson Valley is awarded a very slight comparative advantage over Dutchess due to Mr. Roosa's 100% ownership of JDR Associates.

The Best Practicable Service

39. In ascertaining which applicant is likely to provide the best practicable service to the public, full-time participation by owners in station operation is of substantial importance. *Policy Statement, supra.*, 1 FCC 2d at 395. Particular weight is given to participating owners who will occupy responsible staff positions. *Id.*; see *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1084 (Rev. Bd. 1980). Other attributes of participating principals, such as local residence and participation in civic activities in the service area are significant qualitative factors which enhance an applicant's integration proposal. *Policy Statement*, 1 FCC 2d at 395-396.

40. In *TV 9* v. *FCC*, 495 F. 2d 929 (D.C. Cir. 1973), *cert. denied*, 419 US 986 (1974), the court held that minority ownership and meaningful participation in the station affairs entitles an applicant to comparative merit. The Commission has indicated that this merit is to be considered as an enhancement to an applicant's integration proposal. *WPIX, Inc.*, 68 FCC 2d 381 (1978). Female participation of principals also enhances an applicant's integration proposal. *Gainesville Media, Inc.*, 72 FCC 2d 799, 805-806 (Rev. Bd. 1978); *Mid-Florida Television Corporation*, 69 FCC 2d 607, 652 (Rev. Bd. 1978)[11] and *Horne Industries, Inc.*, 54 RR 2d 249, 255-59 (Rev. Bd. 1983).

Qualitative Comparison

41. Dutchess proposes full-time integration of one of its principals, James Roosa, a 24% stockholder. It also proposes part-time integration of one other stockholder, Irwin Katz, a 38% stockholder. The *Policy Statement, supra.*, indicates that the Commission is "primarily interested in full-time participation." 1 FCC 2d at 395. The credit to be given drops sharply as the time to be spent moves away from full-time. *Id.* Thus, the

[11] While the Commission set aside this decision pursuant to a settlement agreement, it indicated no disapproval of the Review Board's decision. *Mid-Florida Television Corporation*, 87 FCC 2d 203 (1981).

half-time participation by an applicant's principal is entitled to substantially less than half the weight to be given to full-time participation.

42. Hudson Valley proposes to integrate all of its partners into the station operation. Three of the partners, holding a total of 81% of the ownership of Hudson Valley, will be integrated on a full-time basis. The fourth Hudson Valley partner, holding 19% of Hudson Valley, will devote at least 20 hours per week to the proposed Poughkeepsie station.

Qualitative Enhancement

Local Residence

43. Attributes of participating owners including their local residence, will be considered in weighing an applicant's integration proposal. Generally, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence accompanied by meaningful participation will be accorded less weight than present residence of several years duration. *Policy Statement, supra.*, 1 FCC 2d at 396.

44. Dutchess' 24% principal and the proposed general manager of the Poughkeepsie station has never resided in Poughkeepsie or the Poughkeepsie area, but has testified that he would move to Poughkeepsie if this application is granted. Dutchess' part-time integrated principal does not plan to move to Poughkeepsie if the application is granted.

45. All of Hudson Valley's integrated principals, while they do not now reside in Poughkeepsie, plan to move to Poughkeepsie if the application is granted. Therefore, Hudson Valley's integration proposal is entitled to a moderate preference over Dutchess for local residence.

Civic Participation

46. Dutchess principal, James Roosa, testified only as to minimal involvement in any activities in Poughkeepsie or in the Poughkeepsie area. Mr. Roosa stated he had visited the Poughkeepsie chapter of a professional organization for salespeople on several occasions four or five years ago. Since this activity is not shown to involve civic affairs and occurred only a few times several years ago, no credit can be given to Dutchess for local civic participation.

47. Hudson Valley's 19% part-time integrated principal, Dr. Carpenter, has had some involvement with civic activities in the Poughkeepsie-Dutchess County area. Dr. Carpenter conducted a month-long series of lectures on nutrition during April, 1981 at a church in Beacon, New York. No other principal of Hudson Valley can claim any civic activity in the Poughkeepsie area. To the extent that Dr. Carpenter has demonstrated a

limited one-time participation in civic activities in the Poughkeepsie area, Hudson Valley's proposal is enhanced by this activity.

Minority and Female Ownership

48. Under the policy enunciated by the Commission in *WPIX, Inc., supra.*, minority ownership, combined with meaningful participation in a proposed station's operation, is to be considered as a factor enhancing an applicant's integration credit. Participation by female owners is also entitled to credit in a similar fashion. *Mid-Florida, supra.*, and *Horne Industries, supra.*

49. None of the principals of Dutchess are minority or female. Dutchess rates no qualitative enhancement under this factor.

50. In comparison, all four of Hudson Valley's integrated principals (three full-time and one part-time) are Black Americans and entitled to minority preference. Additionally, three of Hudson Valley's partners are female (50% full-time integrated and 19% part-time).

Broadcast Experience

51. Previous broadcast experience is an enhancement factor of minor significance. *North Carolina Service, Inc.*, 52 RR 2d 993 (Rev. Bd. 1982). "Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally only an initial advantage, it will be deemed of minor significance." *Policy Statement, supra.*, at 396.

52. Hudson Valley can claim no enhancement for broadcast experience. Dutchess' 24% full-time integrated principal, James Roosa, has had extensive previous broadcast experience at the management level.[12]

Summary of Quantitative and Qualitative Integration Comparison

53. As shown in the following integration chart, Hudson Valley's integration proposal is both quantitatively and qualitatively superior to Dutchess. Therefore, Hudson Valley is entitled to a substantial preference under the best practicable service criterion.[13]

[12] While Harmony was still a party in this proceeding, it mounted a major attack against Mr. Roosa's claim of past broadcast experience. Harmony sought to introduce evidence that Mr. Roosa's claim was untruthful and that he did not possess the claimed past experience at the management level. About the most charitable conclusion that can be made is that Mr. Roosa's testimony remains uncontroverted and his testimony as to past broadcast experience is entitled to full credit and is so treated herein.

[13] A preference for auxiliary power was not considered herein since neither Dutchess nor Hudson Valley propose auxiliary power equipment.

	Dutchess	*Hudson Valley*
Quantitative:		
Full-time Integration	24%	81%
Part-time Integration	38%	19%
Qualitative:		
Minority Integration*	None	100% (81% F/T; 19% P/T)
Female Integration	None	69% (50% F/T; 19% P/T)
Future Local Residence	24% F/T	100% 81% F/T; 19% P/T)
Civic Affairs Participation	None	19% P/T
Broadcast Experience	24% F/T	None

* F/T refers to full-time proposed integration.
P/T refers to part-time proposed integration.

Summary of Comparative Qualifications

54. Hudson Valley is entitled to a slight preference over Dutchess on the criterion of diversification of control of media interest due to Mr. Roosa's 100% ownership of JDR Associates. Hudson Valley is also entitled to a substantial and decisional preference over Dutchess on the basis of its qualitatively and quantitatively superior proposal for integration of its owners into the operation of its proposed station, 81% on a full-time basis and 19% on a part-time basis. The Hudson Valley proposal is substantially enhanced by 100% minority ownership, of which 69% is represented by female ownership, 100% proposed local residency and some limited prior civic involvement by one of Hudson Valley's four principals. Dutchess will not integrate even a majority of its ownership. Dutchess is entitled to some slight enhancement for its proposed local residency and past broadcast experience of its 24% owner, Mr. Roosa, but, this does not approach the substantially superior involvement of Hudson Valley's principals. Accordingly, it is concluded that Hudson Valley is the clear comparative choice.

Final Evaluation on All Issues

Issues Specified in the Designation Order

Issue (a) - This issue is moot since the parties have stipulated no substantial difference in areas and populations.

Issue (b) - The air hazard issue has been resolved favorably to Hudson Valley by summary decision.

Issue (c) - The Section 307(b) issue became moot with the dismissal of the only non-Poughkeepsie application.

Issue (d) - The contingent comparative issue is decisional in this case and is resolved favorable to Hudson Valley.

The Issues Added by Memorandum Opinion and Order released November 29, 1984

(1) The limited financial issue against Hudson Valley is resolved favorable to Hudson Valley.

(2) Both Dutchess and Hudson Valley are found to have reasonable access to the proposed transmitter sites and this issue is resolved favorable to both applicants.

Accordingly, the ultimate decision is based on the resolution of the comparative issue, and, Hudson Valley's application is clearly the preferred application.

55. Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with Section 1.276 of the Rules,[14] the application of Dutchess IS DENIED and the application of Hudson Valley for a new FM station at Poughkeepsie, New York IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

BYRON E. HARRISON, *Administrative Law Judge*

[14] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Customer Premises Equipment
Declaratory Ruling
Embedded Complex Intrasystem Wiring

Petition for declaratory ruling granted in part to allow user access to all embedded complex wiring where a single customer is in sole possession of the premises that could be served by intrasystem wiring. Telephone companies do not have to allow access to spare cable-pairs nor give notice to tariff surcharges. Users must have right to cable records and diagrams to make user access to wiring meaningful.
—*International Communications Assn.*

FCC 85-343

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Petition for Declaratory Ruling Regarding the Right of Users (and CPE Vendors or Maintenance Personnel Acting on the Users' Behalf) to Access Embedded Complex Intrasystem Wiring

MEMORANDUM OPINION AND ORDER

Adopted July 2, 1985; Released July 11, 1985

BY THE COMMISSION:

1. The International Communications Association (ICA)[1] has filed a petition for declaratory ruling seeking clarification of "the rights of users with respect to access to complex embedded intrasystem wiring (including house and riser cable) used with customer-provided equipment."[2] The

[1] ICA describes itself as a non-profit business league of corporate, educational, and governmental users of telecommunications equipment, facilities and services.

[2] The Commission has defined intrasystem wiring as any cable or wiring which (1) is located on a nonresidential customer's side of a demarcation point; and (2) connects station components to each other or to common equipment. The term also includes components associated with intrasystem wiring, such as connecting blocks, terminal boxes, and conduit between buildings or other structures located on the premises of the

petition was placed on public notice and comments were received from 15 parties representing telephone companies, state public utilities commissions and users.[3]

2. ICA states that while the Commission has issued rules and policies regarding user rights with respect to purchase, lease and maintenance of embedded CPE,[4] there is "no comparable comprehensive and clear declaration of user rights in the case of embedded complex intrasystem wiring." This allegedly has led to substantial confusion and inconsistent practices among carriers and state regulatory authorities, the result of which undermines the Commission's policy of reasonable user access.[5] According to ICA, its members report that some BOCs are denying access to embedded complex intrasystem wiring on the basis of size and color of the cable sheath, and have limited user access to house or riser cable even in those situations where the cable serves only one CPE system. This Commission, ICA states, intended to allow the demarcation point, which among other things, identifies the point beyond which the customer may provide his own premises wiring, to be located or relocated in a manner

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same customer. This type of wiring is also known as "multiwiring" or "complex wiring." Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), CC Docket No. 81-893, 95 F.C.C. 2d 1276, 1380 n. 134 (1983) (hereafter "CPE Detariffing Order"). In multi-tenant buildings, house cable is the cable on the customer's premises that runs vertically from the outside plant terminal up through various floors of the building. This cable is also known as riser cable. House cable, which is located on the telephone company side of the demarcation point is recorded in account 242.1 - "Aerial Cable".

[3] The commenters were: Aeronautical Radio, Inc. (ARINC); the Ameritech Operating Companies (Ameritech); The Bell Atlantic Companies (Bell Atlantic); the BellSouth Corporation (BellSouth); Central Telephone Company (Centel); Cincinnati Bell Telephone Company (Cincinnati); the Federal Executive Agencies (FEA); New York Telephone Company and New England Telephone and Telegraph Company (NYNEX); the North American Telecommunications Association (NATA); Pacific Bell (Pacific); the Public Utility Commissioner of Oregon; Public Utilities Commission of the State of California; Southern New England Telephone Company (SNET); Southwestern Bell Telephone Company (Southwestern); and the U.S. West Group (jointly filed comments of Mountain States Telephone and Telegraph Company, Northwestern Bell and Pacific Northwest Bell). ARINC, Bell Atlantic, BellSouth, Centel, ICA, NATA, the ROLM Corporation (ROLM) and Southwestern filed reply comments.

[4] *See* CPE Detariffing Order, note 2, *supra.*

[5] ICA cites the Commission's statements in the Report and Order in Modification to the Uniform System of Accounts, CC Docket No. 82-681, released Nov. 2, 1983, 48 Fed. Reg. 50534 (1983), (hereinafter "Intrasystem Wiring Order"), that "[H]ouse cable on the company's side of the demarcation point (house cable recorded in FCC account 242.1) should continue to be offered pursuant to local tariffs and should be accessible to users and vendors." 48 Fed. Reg. 50541 at para. 58, and in the CPE Detariffing Order that, "[N]on-discriminatory access and use" of the intrasystem wiring retained by the BOCs would be assumed by these telephone companies either through tariffs or other devices. 95 F.C.C. 2d at 1371 n. 139.

that would permit increased user control over all such wiring.[6]

3. Additionally, ICA maintains that users and vendors should also have access to spare cable pairs. ICA argues that in situations where a building cable may contain wires that remain dedicated to some network plant function within a single-tenant area that otherwise constitutes a single premises, the local telephone company should be required to isolate the network plant wiring from other cable facilities.

4. ICA further contends that access to intrasystem wiring should be clarified to mean that the user has a right to obtain cable records and diagrams associated with embedded complex intrasystem wiring. ICA maintains that the availability of the most current set of cable records is critical to the user's ability to assume the responsibilities that the local telephone company has abandoned outright, or is unable to perform. Although these records generally have been maintained by the local telephone companies near the user's premises, ICA asserts that BOCs have removed them to "centralized" locations. ICA claims that some documents have been misplaced, lost or stored in such a manner that documents may not necessarily be retrieved readily. ICA requests that the Commission clarify that users and their agents must have timely and complete access to all cable records, diagrams, and related documentation.

5. Finally, ICA asks that in cases where investment recovery surcharges (*i.e.*, monthly charges imposed on the customer by local telephone companies to recover the telephone companies' investment in the embedded wiring) are assessed, the Commission require a specific notice procedure by which the local telephone company informs the user of the charge, the user's access rights as defined by this Commission, and the telephone company's obligations to provide access. ICA states that business users in New York are charged for approximately 40% of the total cost of CPE systems previously offered by New York Telephone under tariff. ICA suggests that these users may be paying for facilities that they cannot effectively utilize. ICA believes that the surcharges should only cover wiring costs in Account 232 (embedded wiring) for the remainder of the amortization period adopted in CC Docket No. 79-105.[7]

6. NATA, ARINC and the FEA support ICA's petition. NATA urges the Commission to delineate clearly its definition of the demarcation point

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[6] *See, e.g.*, First Report and Order, Petitions Seeking Amendment of Part 68 of the Commission's Rules Concerning Connection of Telephone Equipment, Systems and Protective Apparatus to the Telephone Network, CC Docket No. 81-216, 97 F.C.C. 2d 527 (1984) (hereafter "Inside Wiring Order").

[7] *See* First Report and Order in CC Docket No. 79-105, Amendment of Part 31, Uniform System of Accounts of Class A and Class B Telephone Companies, of the Commission's Rules and Regulations (Expending of Inside Wiring), 85 F.C.C. 2d 818 (1981); Further Notice of Inquiry in CC Docket No. 79-105, 86 F.C.C.2d 885 (1981), Further Notice of Proposed Rulemaking in CC Docket No. 79-105, FCC 85-148 (released April 5, 1985).

and not leave this responsibility to the "local non-discriminatory practices" of the telephone companies. NATA also agrees with ICA that the customer must remain free to locate or relocate the demarcation point to meet the customer's needs, even if this places on the customer's side of the demarcation point cable or wire assigned to Account 242, where the carrier does not need the wire to accommodate other customers.

7. For its part, ARINC (the communications company serving the air transport industry) urges the Commission to issue specific directives to ensure uniformity of policy and to present a clear mandate to the carriers. ARINC contends that while the Commission's position on the relocation of demarcation points and access to certain carrier-side facilities are clear, the carriers often ignore these policies and unilaterally determine a demarcation point or deny access to many facilities. With large user systems, ARINC states, correct placement of the demarcation point is essential to smooth operation. ARINC asks the Commission to require that access be allowed even to facilities which lie on the carrier's side of the demarcation point when necessary and appropriate. ARINC also asks that we require access to multiple-user conduit within shared user areas such as airports and industrial parks.[8]

8. In their comments, the telephone carriers interpret ICA's request as a desire to expand user access rights, not merely a clarification of existing rules and policies. Several parties assert that ICA's petition for declaratory ruling is inappropriate because the petition does not seek to

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[8] FEA's interests, while similar to those outlined by ICA, are peculiar to telephone systems on military bases and in federal office buildings. For example, FEA maintains that having different vendors provide portions of a military installation's cable system unnecessarily increases the complexity of the system by necessitating the addition of network interfaces and demarcation points between cable owned by different vendors. FEA argues that the customer must be given the option to obtain all on-post or intra-building cable from a single vendor. While the Commission has created a waiver of the Computer II Rules permitting AT&T Communications and the regulated BOCs to maintain end-to-end responsibility for the operation of national security and emergency preparedness communications systems, no such waiver has been granted for normal communications services provided by FEA. *See Sixth Report and Order* in CC Docket No. 81-893, FCC 84-652, released January 4, 1985. FEA has failed to make a showing here that would warrant an exception to the requirement that the BOCs provide detariffed intrasystem wiring through separate subsidiaries. FEA also complains that some state commissions have given beneficial use of and maintenance responsibility for certain house cable to the customer but have allowed the carriers to retain title to the embedded wire. In such cases, FEA states, it is faced with legal problems by spending appropriated funds to maintain an asset owned by another who has effectively abandoned it. As a remedy, FEA asks the Commission to rule that under these circumstances cable title passes to the customer. The question of ownership of embedded wiring is currently an issue in a separate proceeding and therefore will not be addressed here. *See* Detariffing the Installation and Maintenance of Inside Wiring, Further Notice of Proposed Rulemaking, CC Docket No. 79-105, *supra* note 7.

"terminate a controversy or remove uncertainty," as required under both Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), and Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, suggesting instead that ICA's petition is more properly classified as a rulemaking petition.

9. The telephone carriers reject unrestricted access to complex intrasystem wiring by users or their agents. The carriers variously state that grant of ICA's request would provoke disorder and peril the service for all users in multi-tenant buildings; would constitute an unwarranted taking of telephone company property; and would require alteration in accepted accounting principles. The public utility commissions of California and Oregon argue that ICA misinterprets the term "access" and is "attempting to have the Commission define 'access' to inside wiring in a manner which would give users and vendors many of the rights incident to ownership of the wiring without being burdened with commensurate ownership responsibilities." California, Comments p. 2; Oregon, Comments, p. 2. For its part, Southwestern maintains that the statements made by ICA are unfounded. Regarding embedded house and riser cable, Southwestern asserts that access is provided pursuant to tariff, is maintained at no charge if owned by the telephone company, and may be supplemented by the user. Southwestern says that embedded intrasystem wiring is unrestricted; may be purchased or leased under the terms of existing tariffs and guidelines; and may be added to, rearranged and removed by the customer.

10. While the telephone carriers acknowledge their duty to cooperate with customers with regard to the location and relocation of the demarcation point, some insist that the telephone company should continue to control the demarcation point to maintain the integrity to all users. They claim that allowing users increased access to house and riser cable, as a consequence of relocating the demarcation point, would be unworkable and would have serious implications on the carriers' ability to provide efficient and reliable service. Ameritech points out that the Commission, in defining the demarcation point in the *Inside Wiring Order*, wanted one entity, either the telephone company or a building owner, to have responsibility and access to the house and distribution cable to assure service continuity.

11. The carriers generally oppose permitting users free use of telephone company spare cable pairs. Southwestern states that often such cable is utilized by telephone companies in providing network services and says it considers unauthorized use of such telephone company owned wiring to constitute a theft of telephone service and a tariff violation. Southwestern, Comments p. 5. Southwestern assumes that ICA is aware that spare cables may contain wiring dedicated to network functions, and it claims that ICA would place the burden on the telephone carrier to

isolate the network wiring and relocate this wiring to other cable facilities, without specifying who would bear the costs associated with this relocation.

12. ICA's request that users be given access to cable records and diagrams is also generally opposed by the carriers, who argue that to allow access to these records would invade the privacy and threaten the security of other customers whose records may be included in those sought. For its part, SNET states that access to cable records by customers would hamper its ability to maintain records; would impose significant administrative burdens on SNET; and could jeopardize SNET's level of service.

13. Southwestern, on the other hand, admits that its records on intrasystem wiring and cables have not been consistently maintained, though it states that records that have been kept on customer premises have not been relocated or removed. Cincinnati notes that ICA has not offered a procedure to share costs associated with maintenance of these records.[9]

14. On the issue of notice to customers regarding investment recovery surcharges, the majority of the carriers do not believe special notification procedures are warranted. According to Ameritech, the wiring charges ICA is concerned with were in existence prior to divestiture and are well documented in the local tariffs, along with the rights and obligations of the user. Ameritech also points out that during the divestiture transition considerable information explaining charges and premises wire policy was distributed to customers. Thus, Ameritech views ICA's request as redundant.

15. In Cincinnati's view, granting ICA's petition would result in certain accounting, administrative, economic and security problems which would outweigh the benefits likely to be achieved. Cincinnati argues that house or riser cable (cable located on the company's side of the demarcation point) and intrasystem wiring (cable located on the customer's side of the demarcation point) are treated differently under accepted accounting principles and cannot be merged.[10]

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[9] In its comments, Cincinnati argues that ICA's petition focuses primarily on the BOCs even though it appears ICA intends that a declaratory ruling would apply to all telephone companies. As an independent telephone company, Cincinnati suggests that because it was not subject to divestiture and was not required to transfer embedded CPE to ATTIS, the problems encountered by ICA have little relevance to the Cincinnati market.

[10] The accounting differences pointed out by Cincinnati are that (1) expenses associated with embedded intrasystem wiring are accumulated in Account 232 and are amortized over ten years, and (2) house and riser cable are components of the network with associated expenses accumulated in Account 242, included in the general rate base and depreciated over approximately 20 years. Thus, Cincinnati maintains that merging the

16. Moreover, Cincinnati contends that providing access to telephone company owned wiring or cable in a building would result in maintenance problems, prevent effective monitoring of the use of the wires and cables, and impair Cincinnati's ability to distinguish and designate facilities being used for network services. Cincinnati also argues that ICA's requests to use "spare" cable pairs assumes that such facilities are readily identifiable as circuits not in use. Cincinnati suggests, however, that there are emergency (alarm) circuits and certain specially designed circuits not easily identified which could be interfered with by allowing the kind of open access sought by ICA.

17. Another concern expressed by Cincinnati is that grant of ICA's request would deprive telephone companies of control of intrasystem wiring, a current asset, without compensation. As an independent telephone company, Cincinnati reiterates that, unlike the BOCs, it was not obligated to divest itself of terminal equipment; it therefore continues to offer directly CPE and intrasystem wiring. Cincinnati urges that the current system of allowing users to purchase new intrasystem wiring (permitting telephone companies to recover unamortized investment) with application of Cincinnati's policy of maintaining and making additions or rearrangements to such wiring is fair to users, including those represented by ICA and general ratepayers.

18. In its reply comments, ICA contends that the telephone carriers have misconstrued the scope of the relief it seeks and have misjudged the effect of a grant of its petition.

19. ICA characterizes the carriers' assessment of its petition as "inaccurate" and suggests that this is the result of their mistaken belief that the relief requested applies solely to multi-tenant or multi-service locations. ICA Reply, p.6. ICA points out, however, that the definition of "intrasystem wiring" (*see* note 2, *supra*) refers to single customer wiring and depends upon the location of the demarcation point. ICA agrees with the carriers' contention that in multi-tenant or multi-service situations dedication of the intrasystem wiring to a single user would not be possible. ICA claims that its petition is only directed at situations where the user is "unqualifiedly in *sole possession* of the premises that could be served by the intrasystem wiring, provided the demarcation point were relocated." ICA Reply, p. 6. The petitioner stresses that in filing its petition it never intended to seek user access to house cable where that cable is shared by other users or where the location or relocation of the demarcation point would adversely affect other users.

20. To illustrate its point, ICA cites a number of cases, including that where the top five floors of a 10-story multi-tenant building are occupied

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two accounts "would be like combining apples and oranges." Response of Cincinnati Bell at p. 4.

by one user, with no other tenants and no network circuits serving those floors. Prior to divestiture and detariffing embedded CPE, the local telephone carrier established a demarcation point in a telephone closet on each floor. Now, ICA states, the user needs full maintenance control over the wiring within the five floors, for example, to add new intrasystem lines from the PBX common equipment. ICA maintains that the carrier should be required to work cooperatively with the user to relocate a single demarcation point on the fifth floor. This relocation, ICA contends, would effectively expand the user's access to wiring that was previously treated as house cable (i.e., the wiring between the fifth floor demarcation and the telephone closets on the higher floors). Not granting the user the right to move the demarcation point, ICA further contends, would frustrate the "user's ability to have single-source maintenance of its PBX intrasystem wiring . . . " because the carrier would have "to maintain the wiring runs between the fifth and tenth floors." ICA Reply p. 9. Other consequences of not relocating the demarcation point in this situation, ICA maintains, are (1) that use of spare cable pairs in the nominal house cable would be frustrated and (2) the user could be forced to spend considerable sums of money "to rewire the portion of the building under its control in order to effect the service expansion desired." ICA Reply, p. 9.

Discussion

21. We first address the procedural issue of whether ICA's petition is properly "a declaratory ruling terminating a controversy or removing uncertainty". 47 C.F.R. § 1.2. We believe it is. The Commission has made a number of decisions regarding inside wiring over the last several years, and the fact that the parties disagree as to the effect of those rulings suggests clarification by way of a declaratory ruling is appropriate. Clearly, establishing burdens and responsibilities may avoid a myriad of individual disputes thereby avoiding costs for the disputants and the adjudicators. Accordingly, we will consider the merits of the petition.

22. The Commission's decisions allowing customer provisions of premises wiring follow from a line of cases which established the general principle that users of the telephone network should be permitted to attach devices (customer premises equipment) to the network that are privately beneficial and not publicly detrimental.[11] Subsequent proceedings addressed the issues of the manner in which telephone companies should supply such equipment and how new and embedded equipment

[11] Hush-A-Phone Corporation v. United States, 238 F.2d 266 (D.C. Cir. 1956), *on remand*, 22 F.C.C. 112 (1957); In the Matter of Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 571 (1968); In the Matter of Telerent Leasing Corp. *et al.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom.*, North Carolina Utilities Commission v. F.C.C., 552 F. 2d (4th Cir.), *cert. denied*, 434 U.S. 874 (1979).

should be treated for accounting purposes. Our treatment of wiring has generally followed, but has not mirrored our treatment of CPE.

23. In the *Second Computer Inquiry*,[12] we concluded that provision of CPE was not a common carrier service and that it should be offered separate from a carrier's tariffed services. Inside wiring was explicitly excluded from the category of equipment affected by that decision.[13] While the Commission was carrying out deregulation of the provision of CPE, the United States District Court of the District of Columbia approved the Modification of Final Judgment (MFJ)[14] in *United States v. Western Electric*, Civil Action No. 17-49 (1956).[15] Among other things, the MFJ required that AT&T divest itself of all the BOCs except Cincinnati Bell and SNET and that embedded CPE owned by the BOCs be transferred to AT&T.[16] However, the embedded wiring associated with this equipment to be transferred was not detariffed and the BOCs retained its ownership.[17] In its *CPE Detariffing Order* the Commission concluded that competition in the CPE marketplace would be better served if embedded intrasystem wiring were retained by the BOCs and made available on a nondiscriminatory basis rather than transferred to ATTIS.[18] In an order designed to make the accounting rules consistent with Commission decisions concerning the detariffing of CPE and the MFJ, the Commission detariffed new complex inside wiring, *i.e.*, new wiring installed after May 2, 1984 for use with complex Systems such as

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[12] Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384 (Final Decision), *reconsideration*, 84 F.C.C.2d 50 (1980), *further reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied sub nom.* Louisiana Pub. Serv. Comm'n v. FCC, 103 S. Ct. 2109 (1983).

[13] Final Decision, 77 F.C.C. 2d at 447 n. 57.

[14] *See* United States v. American Telephone & Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983) (hereinafter MFJ).

[15] This case was consolidated in the District Court with the then pending antitrust litigation brought by the Department of Justice against AT&T.

[16] AT&T Information Systems is the subsidiary established by AT&T for the provision of CPE and deregulated services.

[17] Those independent telephone companies not subject to divestiture retain control of both CPE and the associated embedded wiring which are provided under tariff. The maintenance of embedded system wiring is provided pursuant to tariff, unless states have provided otherwise. In the Third Report and Order in CC Docket No. 81-893, the Commission has established a framework for states to follow in deregulating embedded CPE tariffed at the state level. 49 Fed. Reg. 43667, October 6, 1984, *aff'd on reconsideration*, FCC 85-118 (released March 27, 1985).

[18] CPE Detariffing Order, 95 F.C.C.2d at 1371, para. 164, n. 139. That order, which addressed issues regarding the embedded base of the Bell System companies, specifically excluded the Independent Telephone Companies.

PBXs or key systems,[19] but did not detariff the complex intrasystem wiring already in place. In the *Intrasystem Wiring Order*, we answered questions raised by NATA concerning access to house cable by users and the vendors that service them. We stated:[20]

> Nothing in our proposal would change the tariff status of house cable on the company's side of the demarcation point. Likewise, we have proposed nothing that should inhibit access to house cable by users or the vendors that service them. Therefore, house cable on the company's side of the demarcation point (house cable recorded in account 242:1) should continue to be offered pursuant to local tariff and should be accessible to users and vendors. 48 Fed. Reg. at 50541.

24. The demarcation point definition which divides telephone company facilities from customer facilities, was established in the *Inside Wiring Order*.[21] In so doing, we acknowledged that "multi-unit buildings present peculiar definitional difficulties because the protector may be located in an equipment room, or each unit may be separately served, either from a common point or independently, depending on the characteristics of the structure itself." *Order* at para. 10. We stated "[r]esponsibility for the protector (and its associated grounding) on the network side of the demarcation point rests with the telephone company .... Responsibility for wiring on the subscriber's side of the demarcation point... rests with the owner of the wiring." *Order* at para. 19. As for relocating the demarcation point, the rules adopted in the *Order* provide that "subsequent relocation of a demarcation point may be arranged, either at the subscriber's request or on the serving telephone company's initiative, but the serving telephone company shall not discriminate in its treatment of

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[19] Intrasystem Wiring Order, note 5, *supra*. Since 1978, customers have been allowed to provide their own system wiring, subject to the condition that multiline (system) premises wiring be installed under the supervision of persons with specified experience and qualifications. *See* 47 C.F.R. § 68.215.

[20] Although developed in the context of a proceeding focusing on the subscriber installation of simple wiring, the demarcation point definition equally applies to multi-line or system wiring, all building types (including multi-unit business and residential premises), embedded and new wiring, and for all regulatory purposes, *i.e.*, accounting and COPW. Our pronouncement in note 3 of the Inside Wiring Order that the rules adopted there applied "only to wiring *owned* by the customer" was made in the context of explaining what is meant by "customer-owned premises wiring." It was not intended to make the demarcation point definition less applicable to embedded or complex wiring, as suggested by Centel. *See* Section 68.3 (h), Network Interface or Demarcation Point, which applies to all wiring.

[21] Network Interface or Demarcation Point is defined as "[t]he point of interconnection between telephone company communications facilities and terminal equipment, protective apparatus or wiring at a subscriber's premises. The network interface or demarcation point shall be located on the subscriber's side of the telephone company's protector, or the equivalent thereof in case where a protector is not employed, as provided under the local telephone company's reasonable and nondiscriminatory standard operating practices." *See* 47 C.F.R. § 68.3(h).

demarcation point location or relocation." 47 C.F.R. § 68.213(b). The *Order* also concluded that although "conflicts may occasionally occur between the telephone company and the subscribers in locating the demarcation point, ... we do not believe this warrants a change in our view that our demarcation point definition provides both the necessary location flexibility and subscriber protection. First, if a telephone company's practice in locating the demarcation point is unreasonable or discriminatory, the subscriber may avail himself of regulatory procedures. Moreover ... state regulatory agencies are free to establish terms and conditions requiring local telephone companies to terminate network services at or on subscriber's premises." *Order* at para. 24.

25. We believe the philosophy of the registration program and the various wiring orders, in general, and Section 68.213(b) of the Commission's rules cited above in particular, establish that the burden should be on the telephone company to justify any refusal to afford access by a user to embedded intrasystem wiring or to relocate a demarcation point when requested to do so by a customer or user. As stated in the *Inside Wiring Order*, "[o]ur overriding concern is to permit multi-unit building tenants direct access to the full range of wireline communications services generally available." 97 F.C.C.2d at 534. A customer who demonstrates that relocation of the demarcation point would enhance its ability to satisfy its changing communications needs, without impairing other customers' communications services, should not be summarily refused access to embedded wiring. While we acknowledge the telephone companies' responsibility to provide and maintain the network for all its customers, there are situations where providing access to embedded wiring would not subject the telephone companies to any of the hazards alleged, or otherwise affect service, *i.e.*, cause a public detriment. Indeed, telephone companies could charge for relocation of the demarcation point pursuant to local tariffs. While it is difficult to resolve in the abstract factually intensive issues, in the example cited by ICA (para. 20, *infra*), we would expect the telephone company to perform the relocation pursuant to tariffed practices. Clearly, situations which the customer is in sole possession of the premises with no intervening network circuits or circuits dedicated to other customers warrant the relief ICA seeks.

26. We recognize that where other tenants in the same multitenant building are served by the same house or riser cable or where network circuits are involved, the telephone companies have an obligation to protect the security and reliability of services provided to each customer.[22] Moreover, network services to subscribers could be placed in jeopardy if non-telephone company personnel were allowed to access

[22] Of course, where the building owner controls the cable, he is responsible for the cable and providing access to it. Inside Wiring, 97 F.C.C.2d at 533.

wiring which serves a number of customers. While the carriers' objections generally relate to situations involving a combination of network and customer services, at least two carriers, Pacific Bell and Southwestern, specifically state that it is their policy to provide unrestricted access to embedded cable where it is used exclusively by a customer as intrasystem wiring. Pacific Bell, Comments, p. 12, Southwestern, Comments, p. 4. We see no reason why relocation of the demarcation point under these specific circumstances, where there apparently would be no harm to the network, would be detrimental to the carriers.[23] The telephone companies' objections to user access are not supported by evidence showing that carriers would be harmed by user access or that access would result in harm to the network. Neither ICA nor its supporting commenters expect the carriers to perform this relocation without reasonable compensation.[24]

27. Similarly, even house cable on the telephone company's side of the demarcation point "should be accessible to users and their vendors," to provide access to embedded wiring. *Intrasystem Wiring Order,* note 5 *supra.* The specific procedures accompanying this right of access, though, would depend on the circumstances. Our definition of the demarcation point was designed to be flexible enough to accommodate the various practices of telephone companies. It was not developed as a means of hindering or impairing, in any way, user or vendor access to house cable on the company's side of the demarcation point.

28. We believe the burden also must be on the telephone company where it would deny access to cable records and diagrams. The telephone

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[23] Because local carriers would continue to own cable on both sides of the demarcation point, relocation of this point would merely necessitate a different accounting treatment of the cable which we believe can be implemented without significant economic impact on their operations. In fact, some carriers and state commissions have expressed their desire to move the demarcation point so that house cable would be treated as intrasystem wire. *See,* Petition for a Waiver Permitting a Reclassification of Embedded Complex Intrasystem Wire to Account 232 Station Connections Inside Wire, filed by the Public Utility Commissioner of Oregon and Pacific Northwest Bell, on January 31, 1985. *Also, see* Telerent Leasing Corp. *infra.* Furthermore, relocation of the demarcation point to enhance customer access to telephone company provided house cable will not affect the ownership or maintenance of the embedded wiring unless otherwise authorized by state or federal action or provided for in local telephone company tariffs. *See* Further Notice of Proposed Rulemaking in CC Docket No. 79-105, *supra* note 7.

[24] Terms and conditions of this compensation are, in the first instance, matters more appropriately resolved by state regulatory agencies. Our definition of the demarcation point was designed to be flexible, reflecting the practices of the various states to identify wiring that is exclusively the province of the telephone company against wiring that is owned or accessed by others. Our decision here preserves the integrity of this demarcation concept; the wiring on the telephone company side of the demarcation point remains the responsibility of the telephone company. The accounting consequences of demarcation point relocation will be treated elsewhere. *See* Pacific Northwest Bell waiver petition, *Id.*

companies do not deny that such records are important to make user access meaningful, but rather note maintenance costs, poor record keeping, and privacy considerations complicate complying with the request. While we encourage the telephone companies to take necessary steps to protect other customers, and to assess appropriate charges for record services provided, we believe our interest in making access meaningful requires the records generally be made available. ICA's statement that it has been unable to locate a BOC intrasystem wiring tariff in any state governing demarcation point relocation or maintenance responsibility (Reply Comments at p.18) suggests the telephone companies have not met their responsibility.

29. Access to spare cable pairs raises different considerations. This issue is not unlike the question of the circumstances under which other parties should have access to conduit space. In considering that matter,[25] we refused to require AT&T and the BOCs to make conduit available on a tariffed basis. We had no evidence of the total usable space within conduit, no evidence as to the number of "takers" of conduit that could be accommodated pursuant to tariff, the extent to which additional conduit would have to be constructed, the suitability of conduit to multiple users, or other information we felt necessary to impose such a requirement. We stated we would not countenance carrier actions that would inhibit a customer from installing non- operating company CPE, but believed a BOC would attempt to maximize the value of its existing cable facilities by rearrangements through sale or tariff. ICA or others commenting in support of the petition have not demonstrated this analysis is inapposite here. Accordingly, we will impose no general requirement of access to spare cable pairs.

30. Nor do we believe it appropriate for us to require the sort of notices ICA seeks where a state has required recovery of unamortized investment in embedded complex intrasystem wiring. These matters did not directly relate to the federal interest of assuring the user's right to access his own wiring but rather are the sort of local rate issues best handled by state authorities.[26] We have no record in this proceeding as to what the costs of the notice requirement would be, whether circumstances differ in different states, or the extent to which such a requirement would be consistent or inconsistant with local tariff practices. In these circumstances, we are reluctant to impose what could be a burdensome

[25] AT&T Co. (Divestiture 214 Proceeding), 96 F.C.C.2d 18 at paras. 88-91, (1983), *recon.* 98 F.C.C.2d 141 (1984), U.S. West v. FCC, No. 84-1448 (D.C. Cir. filed Aug. 29, 1984).

[26] In addressing the question of how the unamortized labor costs which form the predominant portion of the embedded intrasystem wiring investment would be recovered, we noted state commissions have a range of options. CPE Detariffing Order, note 21, *supra* at n. 140.

requirement that is only tangentially related to the policies we have adopted.

Conclusion

31. It is the policy of this Commission that users be afforded access to intrasystem wiring. Where the wiring is dedicated to a single user, the telephone company would have a heavy burden in supporting a denial of access or in refusing to relocate a demarcation point. Even where the wiring is shared or is on the telephone company's side of the demarcation point, it would generally be expected to provide access. Rates and practices relating to intrasystem wiring should be tariffed. (*But see* Further Notice of Proposed Rulemaking in CC Docket No. 79-105, *supra* note 7, where we have proposed to transfer ownership of intrasystem wiring.) We also expect telephone companies to provide access to wiring diagrams. Access to additional wiring (such as spare pairs) raises different considerations, and we do not have a sufficient record upon which to base a general policy. Finally, we will not impose detailed notification requirements upon the telephone companies regarding state tariff issues that are largely unrelated to the users access rights.

32. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i) 4(j), 201-205, 208, 215, 218, and 220 of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i) and 154(j), §554(e) of the Administrative Procedure Act, 5 U.S.C. §554(e), and Commission rule 1.2, 47 C.F.R. §1.2, the petition of the International Communications Association is GRANTED to the extent reflected herein and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Broadcasting, Computer Programs
Broadcasting, Definition

Petition for declaratory ruling concerning transmission of computer programs and data files on the main channel of radio b/c stations granted. If the computer signals are intended for use by the general public, they fall within the definition of "broadcasting" and can be transmitted by b/c stations without special FCC authorization. —*Michael L. Darland*

Del. Auth. 85-06

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Petition for declaratory ruling, dated August 27, 1984, concerning the permissibility of transmitting computer data on a radio broadcast station's main channel.

Adopted: Oct. 16, 1984; Released October 17, 1984

Mr. Michael L. Darland, President
The Microperipheral Corporation
2565 852nd Ave., N.E.
Redmond, Washington 98052

Dear Mr. Darland:

This is in response to your petition for declaratory ruling, dated August 27, 1984, concerning the permissibility of transmitting computer data on a radio broadcast station's main channel.

In your petition, you seek to determine whether the Commission would permit AM and FM radio broadcast licensees to transmit computer programs and text files utilizing audible signals over the main broadcast channel. For example, you envision that during a computer talk show an audible radio signal could be broadcast that provided an example of the computer program under discussion. Similarly, an advertiser or sponsor could provide a sample of a software program. These computer programs could be recorded and then be examined by the listener (receiver of the data) on a personal computer.

You indicate that this type of broadcasting is currently very popular in Europe. In view of the increased interest in personal computers in the United States, you believe that such a service would be in the public interest. Further, you indicate that it would be inefficient to provide this service on a subchannel or subcarrier since listeners would be required to purchase special receivers for the few minutes of data transmission a day that is contemplated. Therefore, much of the subchannel capability would be underutilized.

Although some staff doubts have previously been expressed as to the proper regulatory treatment of such programming, a review of the Communications Act and the Commission's rules reveals no bar to the broadcast of a program that includes the transmission of computer signals; provided, that such transmissions meet the general definition of broadcasting as set forth in Section 3 of the Communications Act. That is, the "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." We believe that the transmission of computer programs, as you described, would be consistent with this definition. We also believe that such transmissions would be consistent with the Commission's mandate under Section 303 of the Act to "(s)tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

In view of the fact that the transmission of computer programs and text files by audible tones, as you described above, would meet the statutory definition of broadcasting, we do not believe that a separate ruling or authorization is required. Such authority is contained presently within the radio broadcast station license.

Sincerely,

James C. McKinney
Chief, Mass Media Bureau

Community Qualifications
Comparative Hearing
FM Station, Authorization
Station Community Designation
White Area

Review Board affirmed *ID's* determination that Gulliver, Michigan, an unincorporated area not listed in the Census is a "community" under rule Sec. 73.1120(a), based on combination of objective indicia and evidence showing that residents and businesses subjectively view themselves as belonging to that community. Dispositive Sec. 307(b) preference affirmed for nighttime white and gray area reception services.

—*Mighty-Mac B/cing Company*
MM Docket No. 83-854

FCC 85R-53

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Mighty-Mac Broadcasting Company Manistique, Michigan	MM Docket No. 83-854 File No. BPH-820415BK
American Peakes, Ltd. Gulliver, Michigan	MM Docket No. 83-855 File No. BPH-820415AQ
For Construction Permit for a New FM Station	

Appearances

Jeffrey D. Southmayd and *Michael R. Miller*, on behalf of Mighty-Mac Broadcasting Company; and *David M. Hunsaker* and *Denise B. Moline*, on behalf of American Peakes, Ltd.

DECISION

Adopted: June 20, 1985; Released: June 26, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN) AND JACOBS. BOARD MEMBER BLUMENTHAL ABSENT.

BOARD MEMBER JACOBS:

1. This proceeding involves the mutually exclusive applications of Mighty-Mac Broadcasting Company (Mighty-Mac) and American Peakes, Ltd. (American) for authority to construct a new FM broadcast station to operate on Channel 234 at Manistique or Gulliver, Michigan, respectively. By Hearing Designation Order, 48 Fed. Reg. 44107, published September 27, 1983, these applications (and one other that subsequently was voluntarily dismissed) were designated for hearing on an issue to determine which proposal would best provide a fair, efficient, and equitable distribution of radio service pursuant to Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b), as well as on a contingent comparative issue. Subsequently, by *Order*, FCC 84M-1335, released March 19, 1984, presiding Administrative Law Judge Joseph Chachkin (ALJ) added an issue to determine whether American's proposed station location, Gulliver, is a "community" within the meaning of Section 73.1120(a) of the Rules, 47 CFR §73.1120(a).[1] In an Initial Decision (I.D.), FCC 84D-84, released December 19, 1984, the ALJ resolved the Section 73.1120(a) issue favorably to American and granted its application after awarding it a decisive Section 307(b) preference because it would provide a first aural nighttime reception service to 1,278 persons and a second

[1] This issue was added *after* the hearing was completed based on allegations in Mighty-Mac's Petition to Enlarge Issues, filed January 25, 1984, at 4-5, that American sought at hearing "to broaden the 'community' of Gulliver as described in its application and direct written case" and that Gulliver possessed few indicia of a community. An additional hearing session was held, as was a later post-hearing conference at which the ALJ expressed no need for taking additional evidence but agreed to add the issue so that the parties could address it in their proposed findings. *See* Tr. 248, 504, 506; *see also* FCC 84M-1335, *supra* (formally adding the issue). This unusual procedural stance results, at least in part, from American's concession that when it prepared its hearing exhibits it "did not anticipate that the boundaries of Gulliver would be in fact as large as they actually proved to be .... [W]e were aware that the area was unincorporated and had no legal boundaries .... We just knew the approximate location and the central village area, which was the business area of Gulliver, was in that location." Tr. 483. Although American has here survived the risk of "not anticipating" the bounds of its unincorporated, rural situs because, as will be explained *infra*, the substantial evidence *does* show Gulliver to be a cognizable Section 73.1120(a) station location with sufficiently described boundaries and indicia of "community," our recent admonition to applicants in another context bears repeating here: those applicants who through lack of due diligence fail to finalize their proposals, "in advance of the start of the actual hearing" run a substantial risk that, at hearing, a fatal, basically disqualifying defect will emerge. *Dutchess Communications Corp.*, FCC 85R-49, released June 13, 1985, at para. 16 (quoting *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320, 43 RR 2d 1289, 1298 (1978)).

aural nighttime service to 2,132 persons (by comparison, Mighty-Mac would provide a second such service to 97 persons only). The ALJ also made contingent comparative findings and indicated that, if the comparative issue were reached, American would still prevail because it would receive a moderate integration and a substantial comparative coverage preference.

2. The proceeding is now before the Review Board on exceptions filed by Mighty-Mac and American's reply. The Board has reviewed the I.D. in light of these pleadings, the oral argument held April 26, 1985, and our examination of the record. We adopt the I.D.'s findings of fact and conclusions of law, except as modified herein, and affirm the ALJ's ultimate conclusion that grant of American's application will better serve the public interest, convenience, and necessity.

3. *Section 73.1120(a) Issue.* In concluding that Gulliver is a community within the meaning of the Commission's rules, the ALJ found that approximate boundaries for Gulliver were established on the record by "preponderant and substantial evidence" and that 710 persons reside within Gulliver. I.D., para. 50. He further found that although Gulliver lies entirely within Schoolcraft County (as does Manistique) and is composed of parts of two townships (Doyle, population 629, and Mueller, pop. 255), Gulliver "is not identified either with Doyle or Mueller Townships and is separate and distinct from other identified population groupings in Schoolcraft County." I.D., paras. 13, 23, 52. Additional important findings were that its own residents, businesses, and outside state organizations recognize Gulliver as a separate entity, I.D., para. 52; that a number of civic, social, and religious organizations and businesses exist in Gulliver to serve the community and its residents, *id.*; and that Gulliver has a Post Office, a separate zip code, a bank, a separate telephone exchange, and its own separate listing in the local "Manistique and Cooks-Garden/Gulliver" telephone directory with over 400 individual entries. I.D., paras. 26, 52; American Exh. 1 (attachment D). Based on an amalgamation of these various factors, the ALJ concluded that "Gulliver possesses sufficient attributes to qualify as a community for purposes of Rule [Section 73.] 1120(a) and Section 307(b)." I.D., para. 52.

4. Mighty-Mac excepts to the ALJ's finding that Gulliver is a legally cognizable "community" which has unofficial boundaries containing 73 square miles and a population of 710. It would have it that Gulliver is a mere crossroads, bounded by two traffic speed control signs not more than 3/4 miles apart with a population of between 20 and 50 people. It also suggests that Gulliver is an arbitrary grouping of persons selected from the two real "communities" of Doyle and Mueller Townships. Br. at 17-18, 33-34. For the reasons that follow, we deny these exceptions. The ALJ fully and accurately considered the record evidence and correctly deter-

mined that the weight of the evidence shows Gulliver to be a community approximately co-extensive with "Police District Gulliver," the delineation of Gulliver's boundaries provided by Lt. Jerry D. Bolt, Commander of the Manistique Post of the Department of Michigan State Police. *See* I.D., paras. 11-38, 49-52; para. 6, *infra.*

5. Generally, Section 307(b) of the Act requires that station assignments be made to " 'communities' as geographically identifiable population groupings," and the fact that a location is incorporated or is otherwise listed in the Census is normally sufficient to confer "community" status upon it. *FM Channel Policies/Procedures*, 90 FCC 2d 88, 101, 51 RR 2d 807, 816 (1982); *FM Channel Assignments (Vimville, Mississippi)*, Report and Order, 55 RR 2d 256, 258 (MMB 1983).[2] However, where a proposed location is neither an incorporated area nor listed in the Census reports (such as Gulliver, here), the proponent of that location "will be required to supply the Commission with information adequate to establish that such a place is a geographically identifiable population grouping and . . . therefore . . . a community." *FM Channel Policies/Procedures, supra*, 90 FCC 2d at 101, 51 RR 2d at 816. Typically, in determining whether there exists such a population grouping, the Commission seeks to determine whether the location has sufficient attributes or indicia of "community," such as political, commercial, social, and religious organizations and services serving the community, or whether there is a sense of unity and involvement in community concerns as shown by evidence that "the residents function as and conceive of themselves as a community around which their interests coalesce." *FM Channel Assignments (Vimville, Mississippi)*, Report and Order, *supra*, 55 RR 2d at 258; *see, e.g., FM Channel Assignment (North Naples, Florida)*, 41 RR 2d 1549, 1551, 1553 (BB 1977).

6. In applying these criteria here, we note first and foremost that the Michigan State Police, Manistique Post, recognize the existence of a geographically defined Gulliver district,[3] the residents of which identify themselves as Gulliver residents. I.D., paras. 13, 19.[4] We accept these

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[2] We recently expressed strong reservations, however, that the mere listing of an unincorporated place in the Census is adequate to automatically confer "community" status. *Debra D. Carrigan*, 58 RR 2d 96, 104-08 (Rev. Bd. 1985), *recon. denied*, 58 RR 2d 111 (*passim*) (applications for review pending) (Paradise, Nevada applicant given no §307(b) preference over North Las Vegas applicants; Bureau's conclusion in *Report and Order* (MM Docket No. 84-893), released March 28, 1985 (mimeo no. 3445), that Paradise, a Census Designated Place, is a "community," questioned). We echo that concern here.

[3] The record establishes that 710 persons reside within this district. I.D., para. 23.

[4] Although it appears that Gulliver encompasses parts of two legally recognized townships (Doyle and Mueller) and that the townships provide some municipal services to Gulliver, these factors are not controlling. The "township" is the smallest legally cognizable entity in Michigan with the power to tax and render municipal services. Unincorporated villages, like Gulliver, are accorded no official legal status by the state and must, perforce, lie

boundaries, admitted into the record through the testimony of Police Post Commander Lt. Jerry D. Bolt and described at I.D., para. 12, as geographically delimiting Gulliver. Furthermore, the testimonial evidence of Mrs. Verna Goudreau and Ms. Lynn Norton, long-time Gulliver residents who conceive of themselves as such, corroborated that Lt. Bolt's description of Gulliver is essentially accurate. I.D., paras. 15-18. In addition, three maps of Gulliver prepared independently of the hearing — a Post Office delivery route map, a telephone exchange map, and a map contained in the brochure, "Welcome Gulliver Travelers," prepared by "community-minded business leaders of Gulliver" — conform generally to Lt. Bolt's description. I.D., para. 20. Unlike the situation in *North Naples, supra*, 41 RR 2d at 1552 and n. 6, where the unsuccessful proponent of the "community" of North Naples urged that it had a specific, common telephone exchange assigned for use by its residents and businesses, Gulliver, in addition to a telephone exchange, has a *telephone book*, see para. 3, *supra*, which is certainly a more persuasive indicator of "community" status than an exchange alone. In addition, over 24 area businesses participated in issuing the commercial pamphlet, "Welcome Gulliver Travelers." American Exh. 1 (attachment E). Also, Gulliver has its own zip code and Post Office station (one of only six in the county), a fact which our precedents recognize to be an attribute of a "community." *See, e.g., Verne M. Miller*, 3 FCC 2d 145, 7 RR 2d 455 (Rev. Bd. 1966); *Rockland Broadcasting Co.*, 36 FCC 303, 2 RR 2d 39 (Rev. Bd. 1964), *recon. denied*, 36 FCC 1510, 2 RR 2d 820, *aff'd per curiam*, 352 F.2d 647 (D.C. Cir. 1965). In terms of its commercial activity, we also rely on the ALJ's findings that Gulliver has 26 businesses employing 346 people, including 4 major businesses of which the largest is a major producer and shipper of limestone employing 247 persons and is the largest single employer in Schoolcraft County (which includes Manistique as well as Gulliver), I.D., para. 33, and that the management of the 4 major businesses view their firms as "Gulliver businesses." I.D., paras. 33-36.

7. Despite the above evidence, Mighty-Mac sought to show the contrary — that Gulliver is not a community — through the testimony of Mr. Ferdinand Lesica, the Schoolcraft County Clerk, Registrar of Deeds and Abstractor, and Mr. William Bowman, a Gulliver resident and licensed surveyor. They acknowledged the existence of a tiny crossroads area called "Gulliver" which includes some businesses and the Post Office station, but they do not personally consider the surrounding residential areas within the Gulliver postal delivery area or police district technically

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physically within some township(s). See Mighty-Mac Exh. 6 (attachment 1). Thus, the relevant question to be resolved is whether the record shows that Gulliver carries the indicia of community and communal identification by residents.

to be "Gulliver." I.D., paras. 21-22. While we recognize this testimony,[5] we believe it is clearly outweighed by the preponderance of evidence in the record, see para. 6, *supra*, which shows that the residents and businesses which lie within the boundaries for Gulliver described by Lt. Bolt consider themselves to belong to the Gulliver community. *Cf. Seven Locks Broadcasting Co.*, 37 FCC 82, 84 and n. 2, 3 RR 2d 177, 181 and n. 2 (1964) (absence of clearly delineated areas and populations not fatal where findings show a number of businesses, civic clubs, and associations identified with named communities). Furthermore, we disagree with the implication in the testimony of Mighty-Mac's witnesses that it is appropriate to separate business from residential areas when defining a "community." *Cf. Salem Broadcasting Corp.*, 37 FCC 2d 115, 25 RR 2d 68 (Rev. Bd. 1972).[6] In sum, the objective indicia of Gulliver's community status, together with the record evidence that Gulliver's residents and businesses subjectively view themselves as functioning as a community and belonging to it, are sufficient to support the ALJ's Section 73.1120(a) analysis and his conclusion that Gulliver is a licensable community. *See Verne M. Miller, supra* (unincorporated summer resort of Crystal Bay, Nevada, with population of 500, with fewer indicia than Gulliver, found to be a "community"); *see also Teche Broadcasting Corp.*, 52 FCC 2d 970, 973, 33 RR 2d 902, 906 (Rev. Bd. 1975) ("totality of the circumstances" test used in determining community status).

8. *Section 307(b) Issue.* The ALJ dispositively favored American under the Section 307(b) issue because of its significant "white" and "gray" area reception service advantages. Mighty-Mac has not directly excepted to the ALJ's resolution of this issue, other than to attack American's proposed community of license as lacking the attributes of a licensable community. We have denied its exceptions in this regard, *supra*, and now simply stress our full agreement with the ALJ that

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[5] We note, for instance, Mr. Bowman's paradoxical statement that although he lived "north of Gulliver," Tr. 455, he "would probably tell them [persons from outside of Michigan's upper peninsula] I live . . . in Gulliver," Tr. 459.

[6] Mighty-Mac also relies on *Noalmark Broadcasting Corp.*, 50 RR 2d 755 (1981), and *Risner Broadcasting, Inc.*, 20 FCC 2d 790, 17 RR 2d 1215 (Rev. Bd. 1969), in support of its claim that American should be disqualified. Mighty-Mac Exceptions at 40; Tr. of Oral Arg. at 527. These cases, however, are plainly distinguishable on their facts and therefore inapposite. In *Noalmark*, a licensee was granted permission to change its station location because its former community of license "now has no residents, no business establishment or local government" and therefore "is no longer qualified as a community." 50 RR 2d at 756. And, in *Risner*, the Board disqualified an applicant who had conceded that its proposed community of license, Bagnell, Missouri, with a population of 62 residing in 18 houses and 4 mobile homes and having "no commercial enterprises beyond a grocery store, a fish hatchery, and a four-unit motel . . . would not qualify as a community;" the applicant also failed to justify a rule waiver to serve a wider 5-town area. 20 FCC 2d at 791-2, 795, 17 RR 2d at 1218-19, 1222.

American's provision of a *first* nighttime service to 1,278 persons (5.47% of its total service area population) and a *second* such service to 2,035 more persons than Mighty-Mac is sufficient to outweigh Mighty-Mac's proposed overall service advantage (45,395 people to 23,543). I.D., paras. 4, 54. *See FM Channel Policies/Procedures, supra*, 90 FCC 2d at 91-93, 51 RR 2d at 810-11 (provision of first full-time aural service is the highest §307(b) priority; provision of second full-time aural service and first local transmission service are next in importance); *see also Cherokee Broadcasting Co.*, 17 FCC 2d 121, 15 RR 2d 1205 (1969); *Wilmer E. Huffman*, 32 FCC 1, 22 RR 820 (1962).[7]

9. Having considered all decisionally significant exceptions, we affirm the ALJ's ultimate conclusion that a grant of American's application will best provide a fair, efficient, and equitable distribution of radio service.[8]

10. ACCORDINGLY, IT IS ORDERED, That the application of American Peakes, Ltd. (File No. BPH-820415AQ) for authority to establish a new FM broadcast station at Gulliver, Michigan IS GRANTED, and the application of Mighty-Mac Broadcasting Company (File No. BPH-820415BK) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

[7] Likewise, we affirm the ALJ's conclusion that Gulliver is too minor a community for American to receive a dispositive preference for establishing a first local transmission service to which it would otherwise presumptively be entitled. I.D., para. 54. *See Ruarch Associates*, 99 FCC 2d 338, 56 RR 2d 1593 (Rev. Bd. 1984). In reaching this conclusion, we parenthetically note that the doctrine of *Huntington Broadcasting Co.*, 5 RR 721 (1949), *reh. denied*, 6 RR 569 (1950), *aff'd*, 192 F.2d 33 (D.C. Cir. 1951), does not apply to this class C comparative contest because no urbanized area is involved here. *See generally, Debra D. Carrigan, supra* note 2, 58 RR 2d at 101-103 ("Suburbanite Model").

[8] We, therefore, need not reach the contingent comparative issue. *See FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955).

FCC 84D-84

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Mighty-Mac Broadcasting Company Manistique, Michigan	MM Docket No. 83-854 File No. BPH-820415BK
American Peakes, Ltd. Gulliver, Michigan	MM Docket No. 83-855 File No. BPH-820415AQ
For Construction Permit for a new FM station	

Appearances

Jeffrey D. Southmayd and *Michael R. Miller*, on behalf of Mighty-Mac Broadcasting Company; *David M. Hunsaker* and *Denise B. Moline*, on behalf of American Peakes, Ltd.; and *Stephen Yelverton*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
JOSEPH CHACHKIN

Issued: December 14, 1984; Released: December 19, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Mighty-Mac Broadcasting Company (Mighty-Mac) and American Peakes, Ltd. (American)[1] for a construction permit for a new FM station to operate on Channel 234C (94.7 MHz at Manistique, Michigan or Gulliver, Michigan. By *Hearing Designation Order* MM 6080 (August 26, 1983), the Chief, Audio Services Division, pursuant to delegated authority, designated the applications for hearing on the following issues:

(1) To determine: (a) the areas and populations which would receive primary aural service from the proposals and the availability of other primary service to such

[1] This proceeding initially involved a third applicant, Greater Peninsula Media, Inc., whose application was dismissed with prejudice pursuant to a settlement agreement. See *Order*, FCC 84M-161, released January 13, 1984.

areas and populations, and (b) in light thereof and pursuant to §307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

(2) To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to §307(b) which of the proposals would, on a comparative basis, best serve the public interest.

(4) [1a] To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

At the post-hearing conference on March 15, 1984, and by *Order*, FCC 84M-1335, released March 19, 1984, the Presiding Judge granted Mighty-Mac's Petition to Enlarge Issues against American to include the following:

(3) [1a] To determine whether the station location applied for by American Peakes, Ltd. is a community as contemplated under Section 73.1120(a) of the Commission's Rules.

2. A prehearing conference was held in this proceeding on October 27, 1983. Hearing sessions were held at the Commission's offices in Washington, D.C. on January 10-11, 1984, and February 9, 1984. On February 9, 1984, the Presiding Judge closed the record in this proceeding (Tr. 470-71). At a post-hearing conference held on March 15, 1984, the Presiding Judge reopened the record to admit supplemental exhibits, enlarged the issues,[2] and requested further engineering information. The record was reclosed by *Order*, FCC 84M-1899, released April 18, 1984. Proposed findings of fact and conclusions of law were filed by Mighty-Mac and American on May 29, 1984 and replies were filed by them on June 21, 1984.

Findings Of Fact

Section 307(b) Issue

Technical Service

3. Both Mighty-Mac and American propose to construct and operate a new Class C FM station on Channel 234. Both propose to operate on 100 kW and at 500 feet HAAT (Jt. Ex. 1, p. 1). Since the transmitter sites proposed by each applicant are different, there is a difference in the proposed coverage.

4. Overall, Mighty-Mac proposes to serve a total of 45,395 persons over 2,565 square miles. American will provide service to a total of 23,543 persons over 3,124 square miles. The cities of Escanaba (pop. 14,355) and Gladstone (pop. 4,533) are located within Mighty-Mac's uncommon 1 mV/m service area (Jt. Ex. 2, p. 3). Both cities receive 4 other daytime aural service and three nighttime aural services from Escanaba broadcast

[1a] The issues have been renumbered for clarity.

[2] Tr. 503-504; See also, *Order* FCC 84M-1335 (released March 19, 1984).

stations (Jt. Ex. 1, Table VI, p. 10). The city of Munising (pop. 3,083) is located within American's uncommon 1 mV/m service area. Munising receives 5 other daytime aural services and 4 nighttime aural services. (*Id.*) The following chart describes the population and areas served by each applicant.

MIGHTY-MAC BROADCASTING COMPANY

Description	*Population*	*Area (Sq. Miles)*[3]
1.0 mV/m	45,395	2,565
Common Area	15,910	2,134
Uncommon Area	29,485	431

Mighty-Mac's proposed 1.0 mV/m Contour will provide the following levels of FM service to the indicated areas and populations:

Description	*Population*		*Area (Sq. Miles)*	
	Day	*Night*	*Day*	*Night*
First Aural Service (0)	0	0	0	0
Second Aural Service (1)	0	97	0	26
Third Aural Service (2)	0	151	0	56
Fourth Aural Service (3)	0	27,626[4]	0	357
Fifth Aural Service (4)	18,888[5]	107	52	17

AMERICAN PEAKES, LTD.

Description	*Population*	*Area (Sq. Miles)*[3]
1.0 mV/m	23,543	3,124
Common Area	15,910	2,134
Uncommon Area	7,633	990

American's proposed 1.0 mV/m Contour will provide the following levels of FM service to the indicated areas and populations.

Description	*Population*		*Area (Sq. Miles)*	
	Day	*Night*	*Day*	*Night*
First Aural Service (0)	0	1,278	0	397
Second Aural Service (1)	0	2,132	0	209
Third Aural Service (2)	0	532	0	103
Fourth Aural Service (3)	102	1,336[6]	47	38
Fifth Aural Service (4)	528	1,271[6]	235	17

(Jt. Ex. 1, Table V, p. 9).

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[3] Mighty-Mac's 3.16 mV/m contour serves 63% of "Police District" Gulliver and American's 3.16 mV/m contour serves 100% of "Police District" Gulliver, discussed, *infra*, (American Ex. 23, p. 2).

[4] Population includes Urban Areas.

[5] Population consists of Gladstone and Escanaba City.

[6] Population includes Urban Areas.

Community Characteristics - Manistique

5. Manistique, Michigan is located on the Michigan Upper Peninsula at the mouth of the Manistique River along the Northern Shore of Lake Michigan in Schoolcraft County (American Ex. 2, p. 1; Mighty-Mac Ex. 5, p. 1). It covers approximately 6 square miles (Mighty-Mac Ex. 5, p. 1). Manistique's total population in 1980 was 3,962 (American Ex. 2, p. 1; Mighty-Mac Ex. 5, p. 1). Its population in 1960 and 1970 was, respectively, 4,775 and 4,324 (American Ex. 2, p. 1).

6. Manistique is an incorporated municipality organized in Schoolcraft County and operating under the laws of the State of Michigan. Manistique is the county seat of Schoolcraft County (Mighty-Mac Ex. 5, p. 2). Manistique is governed by a 5-member City Council headed by a city manager, selected by the Council. City Council members are elected every four years (American Ex. 2, p. 1; Mighty-Mac Ex. 5, p. 2). The Manistique city government provides its own police and fire protection service to residents of Manistique. Ambulance service and refuse pick-up are provided jointly by Manistique and Schoolcraft County. Manistique operates its own sewage disposal plant. Water is obtained from the Indian River and supplied to Manistique residents by a city-run water works system. The Manistique City government also operates the Manistique Boat Marina docking and launching facility, a ski hill and a recreation center (Mighty-Mac Ex. 5, p. 3).

7. The Schoolcraft Memorial Hospital, a 55-bed hospital servicing all of Schoolcraft County, is located in Manistique. A 75-bed medicare facility operated by Schoolcraft County is situated adjacent to Schoolcraft Memorial Hospital (Mighty-Mac Ex. 5, p. 3). Lakeside and Lincoln elementary schools serve the children of Manistique residents attending kindergarten through the sixth grades. Manistique High School provides elementary school classes and also serves Manistique children in the seventh through the twelfth grades. Children in the Manistique area living outside the city limits of Manistique, including those from the Gulliver Lake Area, also attend Manistique High School. St. Francis DeSales, a Catholic School, is also located in Manistique (Mighty-Mac Ex. 5, p. 3).

8. Two banks are located in Manistique, the State Savings Bank and the First National Bank. Manistique also has two credit unions and a branch office of the Detroit and Northern Savings and Loan. There are some fifteen motels and resorts located in the area, and the city has approximately 82 retail establishments. The major industry in Manistique is the Manistique Pulp and Paper Company, which employs some 200 people (American Ex. 2, p. 2).

9. The City of Manistique has a number of service groups, including the Veterans of Foreign Wars, Elks Club, Knights of Columbus, Masonic

Lodge, Chamber of Commerce, Jaycees, Rotary Club, American Legion, Lion's Club, Kiwanis Club, and the Grange and the Schoolcraft Sportsmans Club. Also present are local chapters of national organizations such as the Cancer Society, the Red Cross, and the Association for Retarded Children. A number of national labor organizations have local chapters in Manistique, including the Carpenters and Joiners, United Steel Works, Pulp and Sulphite Workers, Papermakers, Tool and Die Workers, and State, County and Municipal Employees (American Ex. 2, p. 3). The following churches are located in Manistique: Assembly of God, Bethel Baptist Church, First Baptist Church, St. Albans Episcopal Church, St. Frances DeSales Catholic Church, Seventh Day Adventist Church, Presbyterian Church, First United Methodist Church and Free Methodist Church (Mighty-Mac Ex. 5, p. 4).

10. Manistique's communications needs are served by the Manistique Pioneer Tribune, a weekly newspaper, and by the Manistique TV Cable Co., with eleven channels and an HBO channel. Radio Station WTIQ(AM) is licensed to Manistique, as a full-time facility (American Ex. 2, p. 4).

Community Characteristics - Gulliver[7]

11. American proposes Gulliver, Michigan as its community of license. Gulliver is an unincorporated area (Tr. 96) within Doyle and Mueller Townships in Schoolcraft County, on the Upper Peninsula of Michigan, 11.28 miles east of Manistique, Michigan (American Ex. 8, 18, 21, 22; Mighty-Mac Ex. 5, p. 5; Tr. 56). Since it is an unincorporated area, Gulliver has no legally defined boundaries (Tr. 96, 165, 264-65, 374, 392, 394).Several witnesses testified as to what they considered to be the parameters of Gulliver.

12. Lt. Jerry D. Bolt is the Commander of the Manistique Post of the Department of Michigan State Police. His police jurisdiction includes all of Schoolcraft County South of M28 and a portion of Delta County to the West. Gulliver is within his Post area (Tr. 158-60). Lt. Bolt is familiar with Gulliver both personally, (Tr. 162) and through his official duties (Tr. 159-161). Lt. Bolt described Gulliver as follows:

> "Starting at the intersection of U.S. 2 and County Road 438, I would go north on that road approximately a mile and a half or two miles to its intersection with County Road 433. Then go in a northeasterly direction on County Road 433 approximately 2 miles where it comes into the intersection of County Road 433, and then it runs directly east approximately five or six miles until it comes to the county line where Schoolcraft County meets Mackinac County.
>
> That whole area I would consider the Gulliver area.
>
> Q. And it extends South to the Lake Michigan shore line?

[7] The findings on the Section 73.1120(a) issue involving Gulliver are also included under this heading.

A. That is correct.

Q. And southeast to Seul Choix Bay.

A. And I might also add that going south from U.S. 2 from my starting point which was County Road 438, that would be—the Gulliver Area would run south directly to the shores of Lake Michigan. (163-64).[8]

13. The area described as Gulliver by Lt. Bolt lies all in one county, and includes part of two townships, Doyle and Mueller (Tr. 164, 186). It covers an area of 73 square miles (American Ex. 23, p. 2). This area is designated as Gulliver by the State Police for police purposes. There is general agreement among the personnel at the Post as to the boundaries of Gulliver (Tr. 165). Lt. Bolt stated that the reason for the identification of the boundaries of Gulliver for police purposes were that the residents identified themselves as Gulliver residents (Tr. 181-84; 194).

14. Gulliver is one of several areas similarly designated for Michigan State Police purposes. Other areas include Blaney Park, (Tr. 183, 190). Thompson, Germfask, Cooks, (Tr. 181-82, 192) Indian Lake, and Smith Lake (Tr. 181-82). Some of these areas coincide with the townships in which they are located, e.g., Germfask and Thompson (Tr. 192). Others, such as Cooks, which is within Inwood Township, do not coincide with the township area (Tr. 192).

15. Mrs. Verna Goudreau corroborated the boundaries of Gulliver as described by Lt. Jerry Bolt (American Ex. 10). Mrs. Goudreau who lives on Gulliver Lake, testified that she considers herself to be a resident of Gulliver (American Ex. 10, p. 1; Tr. 284). Mrs. Goudreau who has been a resident of Gulliver for 47 years, is the Branch Manager of the State Savings Bank in Gulliver, and is an elected member of the Doyle Township Board of Trustees, holding the office of Treasurer. She has held that office since 1970 (American Ex. 10; Tr. 256). Mrs. Goudreau agreed that the boundary described in American Ex. 8 approximates the boundaries of the unincorporated area known as Gulliver, and that she generally refers to the depicted areas as Gulliver (American Ex. 10, p. 1). She has believed for her entire life that the outlined area constituted Gulliver (Tr. 292-94). When she saw it on the map, all she had to do was certify that the depicted area was Gulliver, since it coincided with her own concept of Gulliver (Tr. 922-93). Mrs. Goudreau also testified that her in-laws who live near Seul Choix Point, as well as other residents of Mueller Township with whom she is acquainted also consider themselves to be Gulliver residents (Tr. 300). The other four members of the Doyle Township Board of Trustees also live within the area described as Gulliver by Lt. Bolt and refer to themselves as Gulliver residents (American Ex. 10, p. 1-2).

[8] This area was initially described on a Michigan Department of Natural Resources Map; it was later drawn in on a Schoolcraft County Road Map, and reproduced as American Ex. 8.

16. Mrs. Goudreau considers that the following places are located in Gulliver: Gulliver Lake, (Tr. 268) Green School, (Tr. 271-72) Woods, (Tr. 272) Vanetta Road, (Tr. 286-87) and Seul Choix Point (Tr. 300). Mrs. Goudreau would also include the Bowman Road area in Gulliver, although it was not included in the map shown to her (Tr. 296-97). However, she would not include Blaney Park as part of Gulliver (Tr. 296).

17. Mrs. Goudreau's concept of Gulliver is similar to the area served by the Gulliver Post Office (American Ex. 14, p. 2; Tr. 295). The Postal delivery route, as it appears on a map prepared by Post Office personnel shows that the delivery area of Gulliver covers the same areas described by Lt. Bolt and Mrs. Goudreau, as well as an additional area north of County Road 433 near Cedar Lake (American Ex. 14, p. 2).

18. Ms. Lynn Norton also corroborated Lt. Bolt's testimony regarding Gulliver. Ms. Norton is a lifelong resident of Gulliver, (Tr. 285) and is an employee at the State Savings Bank in Gulliver. She is an elected member of the Doyle Township Board of Trustees and has held the office of Township Clerk since 1980 (American Ex. 11). Ms. Norton was shown a copy of American Ex. 8 depicting the parameters of Gulliver as described by Lt. Bolt (American Ex. 11, p. 1; Tr. 318). She agreed that the area drawn on American Ex. 8 approximates the boundaries of the unincorporated area known as Gulliver, and that she generally refers to this area as Gulliver. (*Id.*) Ms. Norton would also include the Bowman Road area in Gulliver, (Tr. 318) and generally considers the area served by the Post Office to be Gulliver. (*Id.*) Ms. Norton testified that place names such as Green School or Gulliver Lake do not indicate separate communities, but only residential areas in Gulliver. They are used in describing specific locations to local residents, but are not separate from Gulliver (Tr. 322).

19. Deputy Sheriff Robert Fisk of the Schoolcraft County Sheriff's Department also corroborated the boundaries described by Lt. Bolt in American Ex. 8 (American Ex. 13, p. 1). Deputy Fisk testified that had he drawn the markings on the map, he would have extended the northern boundary of the area described by Lt. Bolt to include the Bowman Road area, and to also include the Lang Road area along Cedar Lake. His basis for including those additional areas is that County Sheriff reports would list calls from those areas as from Gulliver (Tr. 331-34). The area described by Deputy Fisk is the total area the County police consider to be Gulliver for internal police report purposes. For State statistical reporting purposes. Township names are used. (Tr. 340). The Gulliver boundaries described by Deputy Fisk follow existing roads; (Tr. 342-43) and the area described is the same area covered by the Gulliver postal route (Tr. 340). However, Deputy Fisk noted that the Gulliver area, as defined for County police purposes, was not established merely because it is the same area served by the Post Office (Tr. 348). Deputy Fisk stated that the principal

reason was that persons who lived in the area identified themselves as Gulliver residents (Tr. 341, 347-49).

20. Three maps of Gulliver prepared independently of this hearing conform generally to the boundaries established by Lt. Bolt, Mrs. Goudreau, Ms. Norton and Deputy Fisk. The Post Office delivery route map (American Ex. 14) as noted above, depicts the area served by the Gulliver Post Office, and the delivery route followed by the post carriers. That route extends from County Road 438 on the west, to the Mackinaw County line on the east; its northern border extends along County Road 433, taking in the Bowman Road area in its northwest corner, as well as the Lang Road area along Cedar Lake. The route serves the Gulliver and McDonald Lake areas, Seul Choix Point and Port Inland (American Ex. 14, p. 2). The delivery area on the Gulliver Post Office map covers approximately the same areas described as Gulliver by Lt. Bolt, Mrs. Gouldreau, Ms. Norton and covers the same area described as Gulliver by Deputy Fisk. The telephone exchange map (Mighty-Mac Reb. Ex. 7, Ex. A) is a current representation of the boundaries of the Gulliver exchange. Exhibit B to Mighty-Mac Reb. Ex. 7 is a legal description of the boundaries represented. The area as depicted and described covers most of the area described as Gulliver by Lt. Bolt, Mrs. Goudreau, Ms. Norton, and Deputy Fisk, except that it begins one mile east of County Road 438 (Mighty-Mac Reb. Ex. 7. Ex. "A"; Tr. 455). The Map also covers additional area to the north of County Road 433 and includes the Blaney Park area (Mighty-Mac Reb. Ex. 7, Exs. "A" and "B"). The map contained in the brochure, "Welcome Gulliver Travelers" (American Ex. 1, p. 22) is a map of the Gulliver area, including Doyle and Mueller Townships. The brochure is sponsored by the "The community-minded business leaders of Gulliver" who are listed in the brochure. (*Id.*). The map depicts the same area as described by Lt. Jerry Bolt in testimony (Tr. 163-64) and as described in American Ex. 8.

21. Mr. Ferdinand Lesica, Schoolcraft County Clerk, Register of Deeds and Abstracter (Tr. 365) also testified regarding the parameters of Gulliver. Mr. Lesica owns a summer residence on Gulliver Lake where he lives approximately half of the summer, plus weekends in the fall and spring. His only involvement in Gulliver affairs (Tr. 392-93) is his membership in the Gulliver Lake Property Owners Association which promotes the interests of Gulliver Lake. Mr. Lesica testified that the area which he considers to be Gulliver is a small area along U.S. 2 that corresponds to the boundaries of an old subdivision (Mighty-Mac Reb. Ex. 4; Tr. 378).[9] That area, which he described as "a spot on the road," (Tr. 401) is where some stores and the Post Office are located (Tr. 378). This

[9] Documents describing that subdivision, Mighty-Mac Reb. Ex. 1 and 2, were deemed inadmissible by the Presiding Judge because they were not relevant to the question of the

would include two grocery stores, the bank, the Post Office, a repair shop, a fuel oil company, a motel and one church (Tr. 403-04). It would not include the Doyle Township Hall, (Tr. 422) the adjacent sports park, (Tr. 423) or the Doyle Township Volunteer Fire Department building (Tr. 425). Mr. Lesica did not consider the Green School area, Seul Choix Point, Inland Stone Quarry, Gulliver Lake or McDonald Lake to be part of Gulliver (Tr. 390-94).

22. Mr. William Bowman, a Gulliver resident and a licensed surveyor, testified to the parameters of Gulliver. Mr. Bowman owns a surveying business which he operates out of his home. He is a member of the Doyle Township Volunteer Fire Department (Tr. 449-50), of the Schoolcraft County Zoning and Planning Commission (Tr. 459-60), and is a member of the Manistique Board of Education (Tr. 450-51). Mr. Bowman testified that what he considers to be Gulliver is an area only slightly larger than the area described by Mr. Lesica (Mighty-Mac Reb. Ex. 4; Tr. 438).[10] That area would include the Doyle Township Hall and the adjacent park, as well as the Doyle Township Fire Department building (Tr. 456-57). He would describe Gulliver as a small community on U.S. 2 (Tr. 438). Mr. Bowman does not consider that Gulliver Lake, Port Inland, Seul Choix Point or the Green School area are part of Gulliver (Tr. 435-41) but stated that Gulliver Lake "is a kind of gray area" that would "be closely related to the Town of Gulliver on U.S. 2" (Tr. 444). Mr. Bowman's basis for distinguishing Gulliver as he described it from the other population groups is that businesses are located in the area he described (Tr. 443). On the other hand, he testified that he delineated Gulliver Lake and McDonald Lake from Gulliver as he described it because these areas are points of reference for giving directions. He used the different areas as directional terms (Tr. 457-59). The areas drawn in by Mr. Lesica and Mr. Bowman on Mighty-Mac Reb. Ex. 4 showing their concept of Gulliver do not coincide with the boundaries for Gulliver shown on the Postal map, the telephone exchange map, or the businessmen's map.

23. The population of the Gulliver area as described by Lt. Jerry Bolt[11] and corroborated by Mrs. Verna Goudreau, Ms. Lynn Norton, and Deputy Fisk is, as of the 1980 Census, 710 people (American Ex. 20, p. 1). Mrs. Goudreau testified that the population of Gulliver is scattered throughout the area marked as the police district. A number of the people live around the Lakes, and there is a grouping of houses in Mueller Township (Tr. 284). The population groupings in Mueller occur because people have built

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parameters of the community of Gulliver (Tr. 467-69). The area described by Mr. Lesica is shown by a solid line on Mighty-Mac Reb. Ex. 4.

[10] The area described by Mr. Bowman is shown by an interrupted line on Mighty-Mac Reb. Ex. 4.

[11] This area is also referred to herein as "Police District" Gulliver.

their houses along the roads in that area (Tr. 286-87). The official 1980 U.S. Census population for Doyle Township was 629 (American Ex. 1, p. 1, 13; Mighty-Mac Ex. 5, Attach. B, p. 2). That figure increases during the summer tourist season (American Ex. 1, p. 1). The official 1980 Census figure for Mueller Township is 255 (Mighty-Mac Ex. 5, Attach. B, p. 3).

24. Gulliver has no separate legal identity, apart from Doyle Township and Mueller Township (Tr. 374). There is no such legal entity in Michigan as an unincorporated village (Mighty-Mac Ex. 5, attach. I, p. 3). The lack of legal identify is true of all unincorporated areas (Tr. 394). However, there is recognition of the fact of the existence of many unincorporated villages in the state of Michigan. The Attorney General of Michigan has recognized that such entities do, in fact, exist and that Gulliver may be one of them (Mighty-Mac Ex. 5, Att. I, p. 1). Gulliver is recognized as an unincorporated village by the Michigan Municipal League and the Michigan Township Association (American Ex. 18). Gulliver is also recognized as an entity worthy of mention by the State of Michigan with regard to its tourist and recreational attractions. It is mentioned several times in the booklet, "Make the Most of Michigan's Central Upper Peninsula", published by the Upper Peninsula Travel and Recreation Association under the auspices of grants from the Upper Great Lakes Regional Commission and the Travel Bureau, Michigan Department of Commerce (Mighty-Mac Ex. 5, Attach. A, pp. 5, 6, 7, 12, 14, 15).

25. "Police District" Gulliver operates under the jurisdictions of Doyle and Mueller Townships (American Ex. 18; Mighty-Mac Ex. 5, p. 5; Tr. 403). Residents in the Gulliver area are dependent upon the state, Schoolcraft County and either Doyle or Mueller Township for traditional municipal services (Tr. 267, 400). Doyle and Mueller Townships provide fire protection service for Gulliver and the surrounding areas through the Doyle Township Volunteer Fire Department (American Ex. 1, p. 2; Tr. 449). The Fire Department is composed of volunteers and equipment from both Mueller and Doyle Townships, which have mutually agreed to share expenses of fire service (Tr. 266, 276, 279). Mueller Township does not have a separate fire department (Tr. 279). The Fire Department maintains a facility in the area described as Gulliver by Lt. Bolt, near the central business district, which consists of a large garage housing the fire equipment and a meeting room (Tr. 457). Mueller Township owns a fire truck and Doyle provides other fire-fighting equipment. Department calls go out through a special telephone system to the volunteers' homes in both Townships. The Townships share in the cost of the telephone system (Tr. 276). Police protection in Gulliver is provided by the Schoolcraft County Sheriff's Department (American Ex. 1, p. 2; Tr. 104).

26. Students from Gulliver are bused to Manistique Schools (American Ex. 1, p. 2; Tr. 103, 269, 450-51). At one time, there was a public school in

Gulliver, Doyle Elementary School (Tr. 269). There was also a school in Mueller Township, the Green School. Both schools were closed in recent years pursuant to a consolidation of schools. The reason for the consolidation was declining enrollment over the entire Manistique school district (Tr. 453-454). The nearest hospital is in Manistique, (Tr. 104, 268-69) but there are two physicians who reside in Gulliver (Tr. 104-05). One of the doctors lists a Gulliver number for emergencies which is different from his personal number (American Ex. 1, p. 18; Tr. 155). Gulliver has a Post Office (one of only six in the County) and a separate zip code (American Ex. k, p. 2). Gulliver also has a separate telephone exchange. The Gulliver portion of the phone book lists over 400 individual numbers (American Ex. 1, p. 2, p. 18-20). The telephone exchange map shows the Gulliver telephone exchange area as covering a portion of both Doyle and Mueller Townships (Mighty-Mac Ex. 7, Ex. "A" and "B").

27. The Doyle Township Hall is located in the area described as Gulliver by Lt. Bolt (Tr. 105-06; 180; 456). The Hall was deeded over to Doyle Township by the Gulliver Community Planning Club in February 1972 (American Ex. 10, Attach. 2; Tr. 256). The Doyle Township Hall is used by the Doyle Township Board of Trustees for its monthly meetings (American Ex. 11, p. 4). It is also the voting place in Doyle Township for State and County elections. (*Id.*). Local civic and social groups also use the Hall without charge, if their activities benefit the community of Gulliver (Tr. 324-25). Memberships in these groups include citizens from both Doyle and Mueller Townships.

28. The Gulliver Community Planning Club was organized, according to its Constitution, on March 1, 1949, for the purpose of

> [improving] our community in regards to health, safety, recreation, social activities and closer co-operation between individuals and all activities in the community.

(American Ex. 12, p. 13; Tr. 256). For a time, the Club was active in providing services for Gulliver. It obtained street lights, telephone service and power within the area (Tr. 287, 289). The Club was made up of residents of the area; no limitations were placed on membership based on residence in Doyle or Mueller Townships. Members were accepted from both Townships, so long as they came from Gulliver (Tr. 289). There was no definition of what constituted Gulliver for purposes of membership in the Club, since, according to Ms. Norton, "everyone knew who lived in Gulliver . . ." (Tr. 290). The Club owned the Township Hall prior to February of 1972, and paid the utility bills and repaired the kitchen for the town hall building even after Doyle Township took over the building (American Ex. 12, pp. 26-27, 33). The Club had its own savings account with the State Savings Bank, (*Id.*, pp. 18-23) and collected dues from its members (*Id.*, p. 24, 28-32). The Club records show that it expended money on civic and social events for the citizens and social groups in Gulliver (*Id.*,

pp. 24-27). The Club remained active after it deeded the Township Hall to Doyle, but eventually became inactive in 1981 (Tr. 288). Accordingly to Ms. Norton, the Club went out of existence because it was no longer able to pay its expenses, a lack of interest and because Doyle Township took over some of the responsibilities of the Club (Tr. 311-312, 317).

29. Gulliver is located in the Michigan Upper Peninsula, a major tourist area. Gulliver offers a number of recreational attractions: fishing, boating and swimming in its lakes, hiking, biking, snowmobiling and cross-country skiing on its wilderness trails, and hunting of bear, deer, grouse, duck and geese during the hunting season (American Ex. 1, p. 2, p. 21-24). In addition to the natural recreation facilities available in this area. Doyle Township maintains a township park on the shore of Gulliver Lake and a sports park adjacent to the Doyle Township Town Hall (American Ex. 1, p. 2, p. 22, 24). Mueller Township maintains the Mueller Township Park near Seul Choix Point (American Ex. 1, p. 22). These facilities are contained in the area described by Lt. Bolt and other witnesses as Gulliver, and within the areas depicted by the three maps mentioned above. The booklet, "Make the Most of Michigan's Central Upper Peninsula" also lists these parks as being in Gulliver (Mighty-Mac Ex. 5, Attach. A, p. 5).

30. A number of Social and Civic Groups have been organized in Gulliver. These groups include the now inactive Gulliver Community Planning Club, Gulliver Community Senior Citizens, the Gulliver Businessmen's Group, the Doyle-Mueller 4-H Club, a Michigan TOPS Club, a Lion's Club, a Humane Society, the Gulliver Lake Property Owners Association, the McDonald Lake Property Owners Association, the Gulliver Baseball Club (now Zellar's baseball Team), and the Doyle Fire Department. These groups meet on a regular basis in the Doyle Township Hall (American Ex. 11, p. 11-12). A number of these groups are also mentioned in the Doyle Township Board Minutes (American Ex. 12, p. 4, 5, 6, 7, 10, 11 and 12).

31. The Gulliver Community Senior Citizens meet twice a month for potluck dinners. It has a membership of between 65-85 people, composed of residents of Doyle and Mueller Townships. This group recently offered to donate money to the Doyle Township Board for the remodeling of the kitchen of the Township Hall (American Ex. 12, p. 12). The Gulliver Businessmen's group is organized, but largely inactive, though it has met at random in the past. The Doyle-Mueller 4-H Club meets several time a week for handicraft and carpentry work, and it holds dog training sessions on Saturdays. The 4-H Horse Council meets once a month. The TOPS Club is a weight-reducing group that meets once a week. The Lion's Club is made up of residents from Mueller and Doyle Townships (Tr. 459); it holds parties and fund raising projects, and sponsors an Annual

Hearing and Seeing Clinic. The Doyle Fire Department holds parties and fund raisers. The Gulliver and McDonald Lakes Associations hold annual meetings, and generally promote the interests of Lake residents in maintaining the Lakes and surrounding properties (American Ex. 11).

32. There exists three Churches in the Gulliver area as described by Lt. Bolt. The Divine Infant of Prague Roman Catholic Church is approximately 4-5 miles east of the Gulliver Post Office on U.S. 2 in Mueller Township (Tr. 425-26, 432-33). It serves the citizens of Gulliver (Tr. 425-26). The Maple Grove Mennonite Church is approximately six miles east of the Post Office on U.S. 2, (*Id.*) and the Reorganized Church of Jesus Christ Latter Day Saints is near the Post Office (Tr. 425). All three churches are specifically listed in the brochure "Welcome Gulliver Travelers" as within the area described as Gulliver (American Ex. 1, p. 24).

33. Gulliver contains a number of businesses and at least one major industry. There are some 26 separate businesses which employ approximately 346 people on a regular full-time or hourly basis. The four major businesses are: (1) Inland Lime and Stone Co.; (2) Mead Gulliver Woodyard; (3) Bowman Gas and Oil Co.; and (4) Old Deerfield Inn (American Ex. 1, p. 3, p. 25-28; American Ex. 9, p. 1). Inland Lime and Stone Co. is a division of Inland Steel Co. and is a major producer and shipper of high calcium dolomite limestone. The company employs 247 persons and is the largest single employer in Schoolcraft County (American Ex. k, p. 3, 12). It is located in Gulliver (American Ex. 1, p. 3, 25; Tr. 178, 215). Mr. Bowman testified that persons at management level at Inland Lime and Stone Co. with whom he is acquainted refer to themselves as a Gulliver business (Tr. 461). The Company is also listed as a Gulliver business in the "Welcome Gulliver Travelers" brochure (American Ex. 1, p. 23). It has a Gulliver mailing address and is listed in the Gulliver telephone exchange (Tr. 462). Inland Lime and Stone owns some 14,000 acres in the Gulliver area, and quarries and produces some two million tons of limestone yearly. It ships the limestone freighter through the Great Lakes, over 100 boatloads per year (American Ex. k, p. 3).

34. Mead-Gulliver Woodyard is a division of Mead Corporation. It operates a storage yard for pulpwood used in Mead plants. 4,000 truckloads of wood per year are received and stored, and are later shipped by rail to Mead facilities in Escanaba, for use in the manufacture of paper. Mead-Gulliver Woodyard employs between nine and eleven people, and owns 25-30 acres in the Gulliver area (American Ex. 1, p. 3). Mr. Bowman testified that management level persons with whom he is acquainted at Mead Woodyard refer to the company as a Gulliver business (Tr. 461). It is

also within the area he identified as Gulliver (Tr. 462). It has a Gulliver mailing address and is listed in the Gulliver telephone exchange (Tr. 462).

35. Bowman Gas and Oil Co. is a family-owned company, established in Gulliver over fifty years ago. It is now being run by the fourth generation of Bowmans. The company is a major area distributor of LP gas, gasoline and fuel oil. It employs twelve persons full-time, and two person part-time, and several more persons on a part-time basis seasonally. Its motor vehicle fleet consists of eight delivery and service vehicles. Bowman Gas and Oil owns 15-18 acres in Gulliver (American Ex. 1, p. 3). Bowman Gas and Oil is located in Gulliver on U.S. 2 near the Post Office (Tr. 213, 403-04, 422, 439).

36. The Old Deerfield Inn is a large summer resort and restaurant which operates during the ten-week summer season. The Inn has twenty 1-, 2- and 3- bedroom cottage units with full occupancy capacity for 105 persons. Its restaurant seats sixty five persons, and it employs fifteen people during the summer tourist season. Old Deerfield owns 101 acres in the Gulliver area, including 1,100 feet of frontage on Gulliver Lake (American Ex. 1, p. 4, 30-32). It is located on Route 1 in Gulliver, (American Ex. 1, p. 30-32; Tr. 179) and is listed in the "Welcome Gulliver Travelers" brochure as a Gulliver business (American Ex. 1, p, 22).

37. The remaining Gulliver businesses are small, employing anywhere from nine to two persons. They include: The State Savings Bank (American Ex. 1, p. 33; Tr. 176, 211, 273, 403-04, 422); Flynn's Friendly Grocery (American Ex. 1, p. 33; Tr. 175, 403-04, 422); the Village Store (American Ex. 1, p. 33; Tr. 176, 403-04, 422); the Village Motel (American Ex. 1, p. 33; Tr. 176-77, 403-04, 422). These four businesses are located near the Post Office in Gulliver. The remaining businesses, Zellar Excavating, Don Tuttle Logging, Hickey's Tavery, Driveline Sales and Service, Phillips Sawmill, Pawley Farms, Jerry's Boyd Shop, the Breezy Beach Resort, P&N, Gulliver Lake Resort, Jones Cottages, Clear Lake Resort, Betty's Hairdos, and Bowman Surveying were all identified by Lt. Bolt as businesses within the area described by him as Gulliver (Tr. 173-179). These same businesses, together with the Dreamland Motel, The River Road Lumber Co., Balog's Resort and Leach's Cabins were also identified by Mrs. Goudreau as being within the Gulliver area described by Lt. Bolt and corroborated by her (Tr. 273-74). Some of these businesses are in Doyle Township, some are in Mueller (Tr. 187). All of the resorts and motels are seasonal businesses, and are open only during the summer (Tr. 192). The retail businesses of Gulliver (excluding Inland Lime, the bank and the resorts) comprise thirteen, or 25% of the total of forty-seven businesses in rural Schoolcraft County (American Ex. 1, p. 4, 11). None of he above businesses have a local advertising outlet.

38. Gulliver and Doyle and Mueller Townships have no local broadcast service or print media (American Ex. 1, p. 6).

Contingent Comparative Issue

Mighty-Mac Broadcasting Company

39. Mighty-Mac is a corporation organized under the laws of the State of Michigan. The officers, directors and shareholders of Mighty-Mac are as follows:

Name	*Office*	*Voting Stock Ownership*
Donald E. Benson	President, Treasurer Director	99.7%[12]
Marylan J. Benson	Secretary/Director	0.3%[12]
Laura Ann Gilbert	Vice Pres./Director	
James W. Briley	Director	
Barbara Ann Vacketta	Director	

(Mighty-Mac Ex. 1).[13]

40. Mighty-Mac is the licensee of WLVM(AM and WMKC(FM), St. Ignace, Michigan, and is the permittee of a new FM station at Cadillac, Michigan. Manistique is approximately 80 miles from St. Ignace, Michigan (Tr. 43) and is approximately 200 miles from Cadillac, Michigan. (*Id.*). WLVM operates on 940 kHz with a power of 5 kW daytime. WMKC operates on 102.9 MHz with a power of 100 kW and an antenna height of 375 feet. The proposed FM station at Cadillac, Michigan will operate with a power of 3 kW and an antenna height of 300 feet above average terrain.

41. Dr. Donald E. Benson, President and 99.7% shareholder, will spend ten (10) hours per week in the day-to-day operation of the proposed FM station. He will not relocate to Manistique (Mighty-Mac Ex. 3, p. 1). Dr. Benson is not involved in Manistique civic activities nor does he intend to become involved (Tr. 63). Mrs. Marylan Benson, Secretary and 0.3% shareholder, will be the Financial Manager of the proposed FM station and will spend approximately ten (10) hours per week in the day-to-day operation of the station (*Id.*) She will not relocate to Manistique. Dr. Benson is a full-time orthodontist, and lives in Lansing, Michigan. He has never worked full-time at a broadcast station (Tr. 43).

42.Mighty-Mac proposes to utilize auxiliary power generating equipment for its station (Mighty-Mac Ex. 4).

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[12] The Bensons are husband and wife (Mighty-Mac Ex. 1).

[13] On March 14, 1984, Mighty-Mac amended its application to show that effective March 1, 1984, Barbara Ann Vacketta and Laura Lyn Gilbert are no longer officers and/or directors of Mighty-Mac. The amendment was accepted for Section 1.65 purposes. See FCC 84M-1698, released April 6, 1984.

American Peakes, Ltd.

43. American Peakes, Ltd. is a Delaware Corporation, with authority to do business in the State of Michigan. The President, 100% subscribed stockholder and director of the corporation is Frances Jo Curtis (American Ex. 3). American is the licensee of Standard Broadcast Station WTIQ, Manistique, Michigan (American Ex. 4; Tr. 89, 136-37). Neither the Applicant or its principal, Frances Jo Curtis, has any other ownership or management interests in media of mass communication (American Ex. 4; Tr. 89).

44. Ms. Curtis will serve as the Chief Executive Officer of the proposed station, and will supervise and oversee all management functions. During construction and initial startup (i.e., for approximately the first 6 months of operation), Ms. Curtis will devote a minimum of 40 hours per week, six days a week to this activity (American Ex. 5, p. 2; Tr. 148-49). The 40 hours a week she intends to devote to the FM station will be time spent physically at the station in Gulliver, and will not include time spend supervising the FM station by telephone (Tr. 152). After this period, Ms. Curtis' time commitment to the station will decrease, as warranted by conditions of operation, ultimately to about 20 hours per week after the first 18 months of operation (American Ex. 5, p. 2). She will continue to oversee and supervise management functions. She will direct the programmings, hold meetings with the departments and make sure each employee follows orders, and will set the rules and policies which will be carried out by the station manager she will hire (Tr. 152-54).

45. Ms. Curtis was born October 17, 1923 in Winnepeg, Manitoba, Canada, and is a United States citizen by process of Naturalization. She has been a resident of the Manistique area for seventeen years, and also maintains a residence in Birmingham, Michigan (American Ex. 5, p. 1). The Manistique area residence is within the proposed service area (American Ex. 5). She presently resides six months of the year in the Manistique area residence located on Indiana Lake in Hiawatha Township and six months in Birmingham, Michigan. During the first year of operation, she will reside full-time at the residence (American Ex. 5, p. 2). She will reside at the Ramada Inn in Manistique in the winter months (Tr. 147). After the first 18 months of operation, Ms. Curtis will take up permanent residence in or near the other residence in Birmingham, Michigan (Tr. 154).

46. Currently, Ms. Curtis owns and operates a real estate and land development business in Birmingham and Troy, Michigan, a lake resort in Manistique, Michigan, and Radio Station WTIQ(AM), also in Manistique (American Ex. 5, p, 1). Ms. Curtis spends about five hours per week on her real estate business, on long distance calls or preparing closing documents. These activities can be carried out by phone and mail (Tr. 142). She

is planning to retire from this business in the next three or four years (Tr. 88).

47. Ms. Curtis is currently a member of the Schoolcraft County Chamber of Commerce, which includes the communities of Manistique and Gulliver, and has maintained her membership in that organization for ten of the past seventeen years. She is also a member of the Indian Lake Property Owners Association, the Manistique Merchants Association (past 17 years), and the Indian Lake Yacht Club (past ten years). She is a dues paying member of these groups and attends meetings whenever possible commensurate with her membership status (Tr. 149, 156). She devotes approximately 2 to 3 hours per month currently to such civic activities (American Ex. 5, p. 3; Tr. 149-53).

48. Since June 27, 1982, Ms. Curtis has been involved with supervising the day-to-day management and operation of Radio Station WTIQ(AM), Manistique, Michigan, of which American Peakes, Ltd. is the Licensee (American Ex. 5, p. 3). She supervises the programming, hires and discharges personnel, and sees that her policies are followed. She supervises her bookkeeper. She does this in person when in Manistique, and by phone when in Birmingham. She requires and receives daily reports (Tr. 151-52). She intends to withdraw from day-to-day participation in the AM station and devote most of her time to the FM, managing the AM by telephone, since they are only 10 miles apart. She expects to spend 10 to 15 hours a week on the AM station (Tr. 143). Ms. Curtis is a graduate (1979) of the Spics Howard School of Broadcast Arts, Southfield, Michigan. She holds Elements 2 and 9 Broadcast Operator's Licenses and an Amateur Radio Operator's License. In 1979, prior to her acquisition of WTIQ, Ms. Curtis sponsored and produced a 15-minute travelogue radio program which was broadcast over WTIQ(AM) for a period of approximately eleven weeks.

Conclusions

Section 73.1120(a) Issue[14]

49. The issue calls for a determination whether Gulliver, the station location applied for by American, is a community as contemplated under Section 73.1120(a) of the Rules. In *Seven Locks Broadcasting Co.*, 37 FCC 2d 82 (1964), the Commission abandoned a strict standard of proof under Rule 73.30 (now Section 73.1120(a)) and called for reliance on prior case law which required less definitive proof as to the community status of a station location, namely, a case-by-case consideration of all relevant facts. In deciding *Seven Locks*, the Commission relied on two earlier Commission decisions, *Mercer Broadcasting Co.*, 22 FCC 1009 (1957) and *Musical Heights, Inc.*, 29 FCC 1 (1960). *Mercer*, in which the Commission granted

[14] This issue will be considered first since it is a qualification issue.

an application for a new standard broadcast station in the unincorporated residential communities of Levittown-Fairless Hills, Pennsylvania signifies there is no hard and fast rule by which a particular population grouping may be adjudged a "community" but rather, a weighing of all relevant facts is the suitable approach. In *Musical Heights*, the Commission awarded a grant to Braddock Heights, Maryland, a small unincorporated community lacking many of the indicia of a viable community, such as civic and fraternal organizations, religious and educational institutions, police and a local government. The Commission test of whether a specified location meets the assignment standard is a liberal one and encompasses consideration of the totality of the circumstances. *Teche Broadcasting Corp.*, 52 FCC 2d 970 (Rev. Bd. 1975).

50. Gulliver is an unincorporated area with no legally defined boundaries and with a small population. However, none of these factors militate against its status as a community. The Commission does not require that a community have clearly delineated areas and populations. *Seven Locks, supra; Centreville Broadcasting.*, 50 FCC 2d 261 (Rev. Bd. 1974); *Marian Moore*, 3 RR 2d 920 (Rev. Bd. 1964); *Hymen Lake*, 46 FCC 2d 560 (Rev. Bd. 1974). In this case, approximate boundaries have been established by a preponderance of evidence. The boundaries for "Police District" Gulliver established by Lt. Jerry Bolt and corroborated by three other witnesses and independently prepared maps indicate that Gulliver is an area some seven miles by ten miles and occupies land areas within Doyle and Mueller Township. Although these boundaries cannot be established with precision, they are supported by preponderant and substantial evidence and will be accepted as Gulliver's boundaries for purposes of this proceeding. 710 persons reside within Gulliver's boundaries. However, it is not necessary that a community have a large population. Thus in *Musical Heights*, a station was awarded to a community of 660 persons. Also, as noted in *Kaldor Communications, Inc.*, 56 RR 2d 137 (Rev. Bd. 1984), in 1979, the Commission granted authorization for an FM station at Mountain Pass, California, population, 250 persons.[15]

51. It is also well established that a community need not be legally incorporated to be considered a community. *Musical Heights, supra; Seven Locks, supra; Teche, supra.* Similarly, the fact that Gulliver relies upon County services for police protection, schools, zoning matters and other services does not detract from Gulliver's status as a community. *Seven Locks, supra; Centreville Broadcasting, supra; Teche Broadcasting, supra.*

[15] In a recent decision, *Ruarch Associates*, FCC 84R-73, released October 18, 1974, the Review Board held that a community with a population of 752 was a separate community for Section 307(b) purposes.

52. The record establishes that Gulliver has boundaries, however unofficial, with a substantial population. Although unincorporated, Gulliver is distinct and separate from surrounding communities. It is not identified either with Doyle or Mueller Townships, and is separate and distinct from other identified population groupings in Schoolcraft County. The record establishes that Gulliver is recognized as a separate entity both by its own residents and businesses and by outside state organizations. That Gulliver residents function as a community is readily seen in the existence of the Gulliver Community Planning Club, a group of residents of both Doyle and Mueller Townships who established an organization to obtain services for the area in which they lived. The Club had been in existence since 1949 to provide services for the community. Its record indicates that it was a viable functioning group, instrumental in obtaining essential services, and later in providing a township hall to Doyle Township, and in the subsequent upkeep of that facility. The existence of the Club is significant evidence of the cohesion of the citizens of community. In addition, a number of civic and social organizations exist in Gulliver to serve the community and its residents. Also, Gulliver has three churches to serve the community. Additionally, there are a number of retail and other businesses and at least one industry located in Gulliver. Gulliver has a Post Office, a bank, a separate zip code, and a separate telephone exchange. Public facilities are located there: the Doyle Township Hall, the Doyle Township Fire Department and the Doyle and Mueller Township Parks are located in Gulliver. Under Commission precedent cited, *supra*, it is concluded that Gulliver possesses sufficient attributes to qualify as a community for purposes of Rule 1120(a) and Section 307(b). The issue is therefore resolved in American's favor.

Section 307(b) Issue

53. Section 307(b) of the Communications Act, as amended, requires the Commission to make a fair, efficient and equitable distribution of radio services. The Commission's general priorities when making a Section 307(b) choice are:

(1) First full-time aural service.

(2) Second full-time aural service.

(3) First local service.

(4) Other public interest matters

[Co-equal weight would be given to priorities (2) and (3)].

Alexandro Broadcasting, Company, FCC 84R-71, released October 11, 1984 (Rev. Bd.); *Santee Cooper Broadcasting Company of Hilton Head, Inc.*, FCC 84R-87, released December 7, 1984 (Rev. Bd.); *FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982).

54. The first two priorities are apposite in this case. American proposes to provide first aural nighttime service to 1,278 persons (5.4% of its total service area population); Mighty-Mac does not propose first aural service. American also proposes a second nighttime service to 2,132 persons as compared to Mighty-Mac's proposal to provide such service to only 97 persons. Mighty-Mac proposes to serve more people than American (45,395 as opposed to 23,543). However, the provision of first and second aural nighttime services is significantly more important than the provision of additional reception service. Since the elimination of white and gray areas is a primary objective of the Commission, American is entitled to a decisive 307(b) preference. The third priority is also apposite in this case. American proposes a first local transmission service to Gulliver while Mighty-Mac proposes a second transmission service to Manistique. Gulliver's population is under 1000. The Review Board has recently ruled that, under these circumstances, the presumption favoring an applicant proposing a first local outlet is rebutted and a 307(b) preference is not warranted. *Ruarch, supra; Hilton Head, supra.* However, unlike *Ruarch* and *Hilton Head,* American proposes service to white and gray areas. Even without a transmission preference, American's proposed service to white and gray areas requires a grant of its application based on 307(b) considerations.

Contingent Comparative Issue[16]

55. Assuming, *arguendo,* 307(b) considerations were not dispositive, American would still be the winner under comparative criteria. Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393, 394-5 (1965). Neither applicant has a media holding in its proposed community of license. Francis Jo Curtis, American's 100% stockholder, is the licensee of a standard broadcast station in Manistique, approximately 12 miles from Gulliver. Manistique is within the service area of American's proposed station. Mighty-Mac is the licensee of an AM and FM station in St. Igrace, Michigan, approximately 80 miles from Manistique and the permittee of a new FM station at Cadillac, Michigan, approximately 200 miles from Manistique. Mighty-Mac's significant regional and statewide media holdings offsets American's ownership of the single station in Manistique. Neither applicant will receive a diversification preference.

[16] The comparative aspects of the respective proposals will be addressed even though the 307(b) determination is dispositive.

56. Turning to the best practicable service criterion, Mighty-Mac receives no integration credit since both of its principals propose to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979. Ms. Curtis, American's principal, initially proposes to work full-time at the proposed station. However, her permanent intention is to devote a minimum of 20 hours per week to the proposed station. American will receive credit for 100% part-time integration. American's quantitative credit is qualitatively enhanced by Ms. Curtis' female ownership, her prior broadcast experience and her residence in the service area and limited civic involvement. American will receive a moderate integration preference. American's proposal to provide coverage to white and gray area entitles it to a substantial comparative coverage preference. *FBC, Incorporated*, 95 FCC 2d 256 (Rev. Bd. 1983). Finally, Mighty-Mac receives slight credit for its proposal to utilize auxiliary power generating equipment. In summary, on the basis of American's preferences under the integration and comparative coverage criteria, American is the clear comparative winner.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of American Peakes, Ltd. IS GRANTED and the application of Mighty-Mac Broadcasting Company IS DENIED.[17]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH CHACHKIN, *Administrative Law Judge*

[17] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Equipment Type Acceptance and Approval
Notice of Inquiry
Rulemaking, Notice of Proposed
Technical Standards
Type Acceptance and Approval

Notice of Inquiry and Proposed Rule Making adopted to amend Parts 2, 22, and 90 to allow use of different emission modes without separate rulemakings through an alternative type acceptance process. The goal of the proposal is to decrease the amount of time required to establish acceptability of new equipment.
—*Mobile Communications Services*
GEN. Docket No. 85-171

FCC 85-288

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Technical Flexibility in the Mobile Communications Services, Rules Parts 2, 22, 74, and 90.	Gen Docket No. 85-171

NOTICE OF INQUIRY AND PROPOSED RULE MAKING

Adopted: May 31, 1985; Released: June 11, 1985

BY THE COMMISSION:

Introduction and Summary

1. On November 8, 1984, the Commission adopted a Report and Order in General Docket 83-114, *A Re-Examination of Technical Regulations*[1] (R&O) which reviewed the fundamental need for and basis of our technical regulations. Four principles were stated that we would use as guidance future proceedings.[2] These principles reaffirmed our commitment to the control of harmful interference in the various radio services and stated that we would strive to make interference control rules so that

[1] *Report and Order* in General Docket 83-114, FCC 84-521, 49 Fed. Reg. 48305 (December 12, 1984), 99 FCC 2d 903.

[2] *Id.* at para. 27.

"they are not unnecessarily restrictive in areas unrelated to interference control" and that we would "attach a low priority to mandating system interoperability."

2. The purpose of this notice is to put forth for public comment specific proposals in the land mobile radio services that would implement these principles. The fundamental hypothesis behind the proposals in this notice is that new technology is not an intrinsic cause of interference in bands with existing users using a traditional technology; rather, the real cause of interference is excessive undesired signal power in the victim receiver. Thus, by controlling the transmitter power of systems using new technologies, we can allow new technology to be introduced into existing bands while at the same time prevent harmful interference to users of standard technologies. In this notice we propose a specific power control approach which we believe is flexible enough to handle new mobile radio technologies without rule making for each new development.[3] We hope that by eliminating the need for lengthy public rulemakings we can facilitate research, development, and marketing of new types of radio technology. We believe that innovative approaches such as this one are necessary to meet our statutory mandate in Sections 7(a) and 303(g) of the Communications Act of 1934, as amended.

History of Technical Flexibility

3. While the Commission has classically specified modulation types for radio services, there has been a long, consistent trend towards technical flexibility for licensees. The first major milestone in this direction was in the Fixed Satellite Service. Section 25.202 of our Rules, first adopted in 1965, authorized frequencies for this service without specifying the modulation type required. In 1969 the Commission authorized subscription television (STV). Rather than setting technical standards for STV emissions, we took an "equivalent interference" approach. The governing rule for STV modulation is given in §73.644(b)(5).[4]

> "Interference to reception of conventional television and subscription television and subscription television programs, co-channel and adjacent channel, monochrome and color, shall not significantly, in the judgment of the Commission, exceed that occurring from conventional broadcasting in compliance with the television technical standards set forth in this part."

4. The next major milestone towards technical flexibility was taken in 1982 with the adoption of the Second Report and Order in PR Docket 79-191 allocating 806-821 MHz and 851-866 MHz for private land mobile

[3] The approach only applies to licensees who are eligible and have received licenses under existing rule provisions. In particular, the wide band provisions of this proposal can only be used by licensees who have licenses for multiple channels.

[4] While the wording of this section has been changed slightly since 1969, the basic concept has not.

uses.[5] In this proceeding the Commission gave technical flexibility to users in these new frequencies "to meet the needs of users who have communications requirements that necessitate innovative systems."[6] We stated that,

> "Technical flexibility will enable licensees to engineer their communications systems without being constrained to use a specific emission mode or bandwidth. By taking this action, we recognize that the best combination of emission mode and bandwidth differs for various users and geographic areas. We also believe that technical flexibility will provide equipment manufacturers with the opportunity to develop more efficient technology."[7] Technical flexibility included both the capability of subdividing a channel into smaller channels as well as the option for multiple channel licensees to use adjacent channels as one large channel without regard to the normal roll-off near the channel edges. (This permits the use of wideband technologies such as time division multiple access and packet radio).

5. In the Docket 79-191 Report and Order, we did not give detailed technical standards to be used by narrowband or wideband equipment. Our only specific requirement was that "where a licensee chooses to use more than a single emission within the authorized bandwidth, the sum of the emissions may not exceed the . . . limits on ERP."[8] However, we also recognized that this was not adequate to prevent any possibility of interference and stated,

> "Nothing we are doing here is intended to increase the potential for adjacent channel and co-channel interference between current and new technology users. We assume, however, that manufacturers involved in the development and sale of two-way land mobile communications equipment are fully cognizant of technical issues concerning adjacent channel and co-channel interference when dissimilar emissions are involved and will take precautions to assure that current technology users are not adversely affected. We recognize that there is some risk involved, yet we believe that this risk is offset by the potential benefits derived from the introduction of innovative technology. Furthermore, the current rules for type acceptance will require manufacturers to request waivers of §90.203 of our rules to market equipment occupying more than one channel."[9]

6. This absence of technical standards both raises the possibility of interference between new technology and existing technologies and creates a "regulatory risk" for potential manufacturers of new technologies as they must seek waivers in order to market their systems. This new proceeding is intended to alleviate these concerns by proposing a specific interference control approach and type acceptance procedure for new technologies.

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[5] *Report and Order* in PR Docket 79-191, 90 FCC 2d 1320 (1982).

[6] *Id.* at para. 156

[7] *Ibid.*

[8] *Id.* at para. 159.

[9] *Id.* at para. 161.

7. The next major decision dealing with technical flexibility was in the Report and Order of Docket 80-57[10] dealing with Revision and Update of Part 22. Some comments in this proceeding advocated a removal of most emission limitations, but since we have always been conservative concerning interference in common carrier radio service and since the only specific data available at the time dealt with amplitude compandored single side band (ACSB), we authorized only ACSB. The technical standards associated with this use of ACSB consisted of 1) a requirement that the out of band emissions of the ACSB transmitters not exceed those allowed for FM (§§22.106, 22.501, 22.600, and 22.1000), and 2) that a study be submitted showing "that the proposed facilities will not cause harmful electrical interference to known pending and licensed ACSB and FM stations in excess of the ratio of desired-to-undesired field strengths as is presently required for FM co-channel interference"[11]. All other types of emissions not enumerated in §22.104(a) are forbidden but may be considered for secondary status with a developmental license[12]. Although one commenting party proposed allowing wideband emissions on adjacent channels similar to that permitted in §90.645, we chose not to authorize this due to an incomplete record but stated that within the limits of our resources, we hope to undertake further evaluation of this approach.

8. In the Report and Order of Docket 84-280, we authorized ACSB for the Broadcast Remote Pickup Service in a general approach that permitted a variety of technologies. We stated that our intent was to be sufficiently flexible to allow broadcasters to choose any technology best suited to their needs without further Commission action[13] and permitted "stacking" of 5kHz channels. This approach is possible for this service because of the small number of licensees and the active role of local coordinators on a daily basis. Other services generally need a more detailed framework.

9. Thus, the Commission has a history of twenty years of trying to give its licensees flexibility to use the technology of their choice. This proceeding seeks to bring the technical standards of Parts 22, 74, and 90 as close as is practicable recognizing the operational differences involved. We propose below a specific technical approach to prevent interference by the use of technical flexibility which we believe is general enough to allow new narrowband *and* wideband technologies without *ad hoc* rulemaking in each case of new technology.

10. We recognize that there are significant differences in the operating environments for Part 22 and Part 90 licensees. Generally in Part 22, a

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[10] *Report and Order* in CC Docket 80-57, 95 FCC 2d 769 (1983).

[11] *Id.* at para. 130.

[12] §22.104(a)(3).

[13] Report and Order in MM Docket 84-280, 49 FR 45155 (November 15, 1984).

relatively small number of licensees operate in any geographic area, and their systems are designed and engineered to provide high reliability and quality of service to the general public. Licensees generally have technicians either as employees or on call. In contrast, Part 90 licenses generally are granted on a shared basis with no guaranteed grade of service. Most Part 90 licensees are not in the communications business are therefore many do not employ their own technical staff. Thus, the Part 90 radio environment is much more complex and it would be much more difficult to rectify interference problems once they occur. For these reasons, different treatment of Part and Part 22 may be necessary and we invite comment on this point.

Overview of Proposals

11. The approach taken in this Notice is to define a new procedure to be called "Alternative Type Acceptance (ATA)" for land mobile transmitter authorization. ATA would be used for equipment which does not meet the conventional technical standards of existing mobile radio rules, such as Subpart I of Part 90. ATA consists of two basic steps. First, the manufacturer (or the distributor in the case of imported equipment) would perform specified tests to determine the interference potential of the equipment to conventional equipment. These tests would determine a power derating which would determine how much power had to be reduced compared to a conventional modulation type so that it did not cause more interference to co-channel and adjacent channel users. In the second step, the test data is sent to the Commission for review and possible replication. When the Commission is satisfied with the derating factors, it issues an ATA grant which includes the derating factors and the conditions of the test such as emission frequency relative to channel center frequency.

12. All Part 22 licensees (except in the Cellular Radio Telephone Service), those Part 90 licensees meeting the eligibility requirement discussed below in Paragraph 20 and all Part 74 licensees in the Remote Pickup Broadcast Service would have the option of using ATA equipment provided they use it with the emission spacing specified in the ATA grant and that they adjust the power of the transmitter(s) by applying the derating factor specified in the ATA grant. Since the ATA process determines the conditions under which the transmitters would not cause more interference than conventional equipment, the application of the derating factors should ensure that conventional users get no more interference than they would from conventional equipment.

13. The ATA application process would be generally similar to existing equipment authorization procedures. No public announcements of applications would be made until a grant is given. Thus, an applicant does not have to reveal the details of his technology to potential

competitors at an early stage as he would have to do in a rulemaking process. The technical information, which is needed for the ATA application, is modeled on testing information which we have developed in the past for rulemakings dealing with new technology. We have generalized this experience in the proposed ATA rules.

Alternative Type Acceptance Testing

14. The specific ATA testing proposal determines the power derating needed for a new modulation by first measuring the new modulation signal level needed to cause interference to the signal using the standard modulation. That new modulation signal level is then compared to the level of an undesired standard modulation signal needed to cause interference. In the case of new modulations which are narrowband (i.e. more than one emission can occupy an standard channel) a group of transmitters using the new modulation are tested together as a unit using specified relative emission spacings. This is a worst case scenario with respect to a possible interference victim as it assumes all the new transmitters are on simultaneously at the closest possible distance to the victim.

15. The general testing setup to be used in ATA testing is shown in Figure A of the proposed of §2.1101 (see Appendix A). It involves three conventional systems (two transmitters and one receiver) as well as the new system, the equipment under test (EUT), which may be composed of more than one transmitter. (This discussion assumes that the equipment to be tested has a bandwidth less than a conventional channel width. The case in which the new equipment is wider is discussed in paragraph 18.) A switch in the setup selects one of two basic test conditions. We will discuss the first position initially. This position is used to determine the amount of co-channel conventional modulation which is needed to disrupt a communication path. The victim receiver is given a combination of two signals: a desired conventional signal which is attenuated to the level specified in the proposed rules and an undesired conventional signal which is attenuated by a variable attenuator. In the first part of the test, the variable attenuator is decreased until the victim receiver receives interference, which is defined as a 12 dB SINAD ratio. The undesired transmitter power that corresponds to this is noted as P_S.

16. In the next phase of the tests, the switch is moved to the second position to measure the interference potential of the EUT. Before the tests are started, the multiple transmitters are adjusted to different frequencies within the standard channel and to possibly different relative powers. The relative powers and frequencies are the choice of the manufacturer and are stated in his application for ATA. Analogous to the first part of the test, the variable attenuator is decreased until interference is observed. The interfering signal is actually composed of power

from each of the transmitters within the EUT, so it is necessary to determine their individual powers, P_i, by now turning them on one at a time and measuring their power. Now the ratios P_i/P_S are the amount of decrease from the standard power from the standard modulation which are needed to ensure that the EUT causes no more interference than the standard modulation. These are a function of the frequency difference, f_i, of each transmitter with respect to the center of the channel. If a licensee with a current license which allows P_L watts of power on a channel with conventional technology were to switch to a new technology with several transmitters at frequencies, f_i, within his channel, he would not increase his interference to co-channel users if he adjusts the power on each f_i such that it is less than $P_L \times P_i/P_S$.

17. So far we have not discussed limits for emission outside of the conventional channel or inband emissions that may cause interference to adjacent channel users. Existing rules for the mobile radio services, such as §90.209 and §22.106, already cover out of channel emissions and a generalization of these standards is included in the proposed §2.1102(f). However, inband emissions near the channel edges may also affect adjacent channel interference. In order to address this problem, we propose two alternatives for the applicant. First, he can show compliance with existing in channel roll off standards for conventional transmitters. Alternatively, he could repeat the tests done previously but with the desired transmitter and victim receiver first tuned one channel above the original channel then tuned one channel below. In this option, the final P_i/P_S should be the *lowest* of the three frequencies for the victim and desired. This is a conservative measure in order to avoid interference to both co-channel and adjacent channel users.

18. A numerical example of using this procedure is given in Appendix B. This example assumes that the equipment proposed for ATA consists of 3 narrowband transmitters that would be spaced at 6 kHz intervals. Based on the ATA test results, a power derating for each of the transmitters is derived.

19. For wide band systems a similar approach is used. The major difference is that there is only one emission from the EUT, but that emission is wider than the bandwidth of the victim receiver. Therefore, the conventional equipment must be sequentially tested at each channel within the bandwidth of the EUT as well as at the channels adjacent to the wide band emission (if the EUT can not be shown to comply with the existing near channel edge roll-off standards). The most conservative power derating found on any channel would then become the overall derating.

20. In order for this type of tests to be reproducible, several technical parameters must be defined precisely. In doing this, we have tried to

model our testing procedure after existing voluntary standards as much as possible. The specific sources of reference have been Electronic Industries Association RS-204-C (1/81) and ANSI C63.2-1982. The proposed rules, thus, give details in §2.1102(e) for input signals to all the transmitters, input signal levels, desired signal level to the receiver, receiver sensitivity, and receiver adjacent channel rejection.

21. While we have proposed specific test procedures and standards for this process, we recognize that none of these were originally developed for exactly the purpose for which we now propose to utilize them. Accordingly, we specifically invite comment on the suitability of these aspects of this proposal. Furthermore, if the comments indicate that significantly different standards or procedures would be preferable, we would expect to issue further proposals to ensure that the user public can comment fully on the standards prior to adoption. Obviously, these standards and procedures are critical to the success of this approach and they will receive our most careful consideration.

Eligibility

22. It is proposed that permission to use ATA equipment be given to all licensees in the Domestic Public Mobile Service (Part 22), except in the Domestic Public Cellular Radio Telecommunications Service, and to all Part 74 Broadcast Remote Pickup licensees. Private Land Mobile Radio Service Licensees (Part 90) may use ATA equipment if they are the exclusive licensee of a channel (only bands above 470 MHz have exclusive licensees) or if they have written consent of all co-channel licensees within a 75 mile radius. Nonexclusive licensees must notify the Commission of their intent to use ATA equipment and of the fact that they have the consent of all co-channel licensees. Whether ATA use will also require approval of frequency coordinating committees will be determined in PR Docket 83-737. Upon receiving this notification, the Commission will amend the license to specify that ATA equipment may be used. ATA users would receive the same protection that licensees with others emission modes receive. We recognize that several adjacent channels are needed for wideband systems and that in almost all cases multiple channel licensees have nonadjacent channels. Therefore, if we adopt the wideband aspects of the proposals, we will try to accommodate licensees trading channels among themselves, as they now can under §90.645(g).

Notice of Inquiry

23. We specifically seek comment on several aspects of the ATA test procedure and on the possible application of this approach to other radio services:

1. *Characteristics of victim receiver*

The victim receiver in the testing configuration should be typical of conventional receivers in the band in question. The sensitivity and bandpass of the receiver will have an impact on the results of tests. The proposed rules are based on the Electronic Industry Association's RS-204-A and require the receiver to have sensitivity and adjacent channel rejection within 3 dB of the standard. Is this the appropriate standard? Should more receiver parameters be specified in order for the tests to be both representative and reproducible? If so, what standards are needed? Would a receiver whose intermediate frequency processing was implemented as a digital filter be a practical way of standardizing receiver performance for the purposes of this testing?

2. *Standard Signal Levels*

In the testing procedure, the standard transmitter is attenuated to 3 dB above the EIA recommended minimum sensitivity level for that band before its signal is mixed with the undesired signal. While it would be convenient to use only one attenuation for all tests, it may not be representative of all interference situations. How may desired standard signal levels should be tested? What should these levels be?

3. *EUT Signal Power Measurement*

We have not specifically proposed how to define the EUT power measured, P_i. While constant envelope technologies such as FM are well defined by average power, other technologies are better characterized in other ways such as with peak envelope power. We request comments on whether we should specify a power measurement approach, and if so, what approach should be used.

4. *Definition of Interference*

The proposed rules describe tests where power is adjusted until interference is noticed, as defined by a 12 dB SINAD measurement with a 1 kHz desired modulation signal. The SINAD measurement is a well recognized method of measuring FM receiver performance in general and we request comment on the adequacy of this approach. However, it may not be optimal for other technologies. Therefore, we request comment on the best approach for interference measurement. For example, a more complex objective measurement of performance such as "articulation index"[14] or "speech communication index"[15] could be used. Does the increased accuracy of these tests justify their complexity in this context?

5. *Fading Simulation*

All of the ATA tests specified above use steady signal strengths and laboratory test conditions. Actual mobile equipment use involves fading signal strengths. While it is well known that this type of desired/undesired interference testing is very difficult under field condition to do reproducibly, it is possible to simulate fading in the laboratory with appropriate equipment. How much of a difference in power level ratios, such as P_i/P_S, should be expected under fading conditions? Is it necessary to require fading simulation as part of the ATA testing procedures? If, so what combination of fading rates and depths should be tested?

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[14] *See* K. D. Kryter, "Methods for the Calculation and Use of the Articulation Index," J. Acoust. Soc. of Am. *34*, 1689-1697 (1962) and K. D. Kryter, "Validation of the Articulation Index," J. Acoust. Soc. of Am. *34*, 1698-1702 (1962).

[15] *See* K. D. Kryter and J. H. Ball, "A Meter for Measuring the Performance of Speech Communications Systems," Report No. ESD-TDR-64-674, Electronic Systems Division, Air Force Systems Command (1964), AD 611 082.

6. *Use of Wideband Emissions by Radio Common Carriers.*

In order to assure high quality service in the Domestic Public Land Mobile Radio Service, we have not generally permitted interstitial channel use between existing channels as we have in the private land mobile services. New narrowband equipment, such as ACSB, may in some cases be able to provide a useful new service on interstitial channels without causing harmful interference to previous licensees. If we were to allow licensees to use wideband, multichannel emissions, they might do so in order to block new entrants on interstitial channels without providing more service themselves. We seek comment on how we can allow licensees the flexibility to use wideband emissions without encouraging anticompetitive conduct. Possible regulatory approaches could include a diligence requirement for implementing the wideband system and a minimum spectrum efficiency standard for wideband systems. Are such controls needed and, if so, what form should they take?

7. *Use of ATA in the Private Land Mobile Services*

In the Private Land Mobile Services, unlike Remote Pickup and Domestic Public Services, there are literally thousands of systems co-existing in an extremely limited amount of spectrum. In addition to being spaced relatively close together in relation to adjacent channel systems, in the vast majority of cases, private users share the frequency with numerous co-channel licensees in a given operating area. Even when all users operate with type-accepted equipment, interference problems arise because of the sheer volume of transmissions. Allowing licensees to use equipment which may not provide the same amount of interference protection could have severe impact on these services. On the other hand, it may be in crowded Private Land Mobile bands where added flexibility and spectrum efficient technologies are most needed. Therefore, we specifically request comments on whether the ATA procedures put forth here should be applied to Part 90 of the Commission's Rules.

8. *Role of Coordinators in the Private Land Mobile Radio Services.*

The role of coordinators in the private land mobile frequency selection process is currently under review in Docket No. 83-737. In order for coordinators to recommend the best possible frequency they must be fully apprised of the actual operating environment, including the technology used. We request comments on how the rules proposed herein would affect the frequency coordination process services and what steps, if any, need to be taken to ensure that coordinators are aware of entities using ATA equipment.

9. *Less Complex Alternatives.*

This proposal was drafted in order to minimize the *a priori* risk of interference to FM licensees. It does so by subjecting new types of equipment to a rigid testing program and limiting transmitter powers to very conservative values. We seek comment on whether less complex alternatives might be preferable.

Consider, for example, a type acceptance program that rated equipment as to peak output power, occupied bandwidth and frequency stability. Licensees might be authorized to utilize any combination of this type accepted equipment so long as the resulting system met the following conditions:

1. The stability of all transmitters was not less than that required of standard communications equipment.
2. No portion of any transmitter's occupied bandwidth could be outside the channel's authorized bandwidth.

3. The sum of the peak powers of all base station transmitters could not exceed the maximum currently permitted. The peak power of mobile transmitters must be reduced from that currently permitted by a factor equal to the ratio of non-standard to standard base station transmitters.[16]

Some systems authorized under this type of scheme might have the potential to create more interference than similarly powered standard communications systems. In other situations, non-standard systems could operate with substantially higher powers than authorized without causing any interference. Rather than providing absolute certainty that all systems would operate in harmony, this scheme would establish a framework within which affected parties could fine tune their systems' design to their mutual benefit. We seek comment on whether it, or some other similar approach, would provide a better balance between encouraging technical innovation and interference protection than the more complex procedure proposed above.

How to File Comments

24. We are setting a lengthly comment period for this Notice (6 months for comments, 2 months for replies) in order to stimulate thorough discussion on these proposals and their implications. We urge existing voluntary standards organizations to use this time to develop coordinated viewpoints on the proposals and the questions in the inquiry. Our staff is ready to work closely with such groups to explain the proposals here and to carry on a dialog subject to the *ex parte* provisions given in paragraph 32.

25. In accordance with the procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before December 16, 1985, and reply comments on or before February 28, 1986. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, providing that such information or a writing indicating the nature and source of such information, is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

26. In accordance with the provisions of Section 1.419 of the Commission's Rules, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a copy of their comments should file an original and 10 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All comments should be clearly marked General Docket No. 85-171, and will be available for public inspection during regular business

[16] For example, if a non-standard system used twice as many base station transmitters as a standard system, peak power of mobile units would be 50% of that permitted for standard systems.

hours in the Commission's Public Reference Room at its headquarters at 1919 M St., N.W., Washington, D.C. All written comments should be sent to: Secretary, Federal Communications Commission, Washington, D.C. 20554. For general information on how to file comments, please contact the FCC Consumer Assistance and Small Business Division at (202) 632-7000. For further information on this proceeding, contact Dr. Michael J. Marcus at (202) 632-7040.

Initial Regulatory Flexibility Analysis

27. *Reason for Action.* The Commission believes that its rules and policies should be reviewed in the context of current social, technological and financial environments in which licensees and applicants operate, so that service to the public may be facilitated while the least regulatory cost is imposed. It is in this light that it is considering modification of its Parts 2, 22, and 90 rules.

28. *The objectives.* The Commission proposes to accommodate new mobile radio technology systems by reducing regulation to the maximum extent feasible. The Commission believes that such action will lead to a more rapid development of mobile radio technology.

29. *Legal basis.* Action proposed herein is taken pursuant to Section 4(i) and 303 of the Communications Act of 1934, as amended.

30. *Description, potential impact and number of small entities affected.* We do not believe that this NPRM will have a detrimental impact upon small entities. Indeed, insofar as our action permits new technology, it is likely that it will benefit both small and large entities which seek to enter the new markets that this action will create. Also, since the action is deregulatory in nature and no new, more restrictive regulations are being proposed, it should provide expanded business opportunities for all vendors and users of communications equipment, both small and large. Beyond this, we are unable to quantify the potential effects of this action on small entities. Comments are requested on this point by interested parties.

31. *Recording, record keeping and other compliance requirements.* The proposed modifications to Part 2 of the Rules would require only record generation by the manufacturer sufficient to meet type acceptance standards for the equipment. The option of using existing procedures is retained.

32. *Federal rules which overlap, duplicate or conflict with this rule.* None.

33. *Any significant alternatives minimizing impact on small entities and consistent with the stated objective.* None.

Other Procedural Matters

34. EX PARTE CONSIDERATIONS: For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that ex parte contacts are permitted, from the time the Commission adopts a notice of proposed rulemaking, until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting, or until a final order disposing of the matter is adopted by the Commission whichever is earlier. In general, an ex parte presentations is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person, who submits a written ex parte presentation, must present a copy of that presentation to the Commission's Secretary for inclusion in the public file. Any person, who makes an oral ex parte presentation addressing matters not fully covered in any previously-filed written comments for the proceeding, must present a written summary of that presentation to the Commission's Secretary for inclusion in the public file on the day that the presentation is made. A copy of the summary must also be presented to the Commission official who receives that oral presentation. The written presentation and summary, described above, must state the docket number of the proceeding to which they relate. For further information, see Section 1.1231 of the Commission's Rule, (47 C.F.R. 1.1231). A summary of the Commission's procedures governing ex parte presentations in formal rule making proceedings is available from the FCC Consumer Assistance and Small Business Division, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

PROPOSED CHANGES FOR FCC RULES AND REGULATIONS
PARTS 2, 22, 74, and 90

The authority citation for Part 2 continues to read: Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j) and 303(r) and Section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

1. New Section 2.1100 is added to read as follows:

2.1100 Alternative Type Acceptance (ATA) Grant

Alternative type acceptance (ATA) is intended as an expeditious alternative for manufacturers who wish to market new mobile radio technologies that do not comply with existing

technical standards and channelization plans. Under this program licensees have an alternative option to use unconventional equipment with the understanding that they must adjust their transmitted power according to the manufacturer's instructions as indicated in the ATA grant in order to prevent interference to other licensees. While the alternative type acceptance procedures are more complicated for the manufacturer than regular type acceptance, under many circumstances they are simpler and faster than petitioning the Commission for a rule change - an option which remains open to the manufacturer.

2. New Section 2.1101 is added to read as follows:

2.1101 Applying for ATA Grant

(a) The general provisions of this subpart, §§2.901, *et seq.* and of §2.983(a)-(g) shall apply to applications for and grants of alternative type acceptance.

(b) An applicant for an ATA grant must test the proposed equipment in the configuration shown in Figure A. The proposed equipment is shown as the equipment under test (EUT) and may consist of more than one transmitter for systems that are narrower in bandwidth than a conventional channel in the band involved. For the tests, the applicant proposes a relative power for each transmitter and a frequency offset from the channel center frequency f_i.

3. New Section 2.1102 is added to read as follows:

2.1102 Tests for ATA Grant

The applicant must perform the following tests:

(a) With the standard desired transmitter, standard undesired transmitter, and victim receiver all tuned to the same channel, adjust the output level of the undesired transmitter until interference as defined in §2.1102(e) is noted at the victim receiver. The undesired received power is defined as P_s.

(b) With the EUT connected in place of the standard undesired transmitter and the transmitters within the EUT adjusted to their relative frequencies and powers, the EUT combined output signal level is adjusted to also cause interference at the victim receiver. This signal level is defined as the power contribution of each transmitter, P_i. The ratios P_i/P_s determine the power derating needed to limit co-channel interference. If the equipment can meet in-channel roll-off characteristics for the service in which it is intended to be used no additional tests are needed. However, if transmitter bandwidth standards for the proposed band and service can not be met the following test must be performed to show adjacent channel protection.

(c) Adjust the EUT first to the channel immediately above the channel of the other equipment and then to the channel immediately below it keeping the relative frequencies and powers of its internal equipment the same. At each channel perform the same tests as in §2.1102(a)-(b). For each transmitter i, pick as the power derating the lowest P_i/P_s of each of the three test conditions.

(d) For an EUT which is proposed to cover more than one conventional channel, the tests must be performed on all the conventional channels that the EUT proposes to cover as well as the adjacent channels if the EUT can not meet the near channel edge within channel roll-off for the service for which it is intended.

(e) For the above test the following procedures shall be used:

(1) The desired transmitter shall be an FM transmitter whose deviation is normal for the frequency at which the test is performed. It shall be modulated with a 1 kHz sinusoid whose amplitude is such that 60% of maximum deviation is obtained. The signal level from the transmitter shall be attenuated such that it is 6 dB stronger than the minimum sensitivity given in Section 7.3 of EIA-RS-204-C (1/82) for the receiver type being used.

(2) The victim receiver shall have an adjacent channel rejection within 6 dB and sensitivity within 3 dB of that given in EIA-RS-204-C (1/82) for the band being tested.

(3) The undesired standard transmitter shall be an FM transmitter with the normal deviation for the band being used. It shall be modulated with a 1.7 kHz sinusoid whose amplitude results in 60% of maximum deviation.

(4) Each EUT transmitter shall have as an input either a 1.7 kHz sinusoid or if it is not a voice radio, typical input signals. The input signal levels to the transmitters shall be typical of expected use.

(5) The definition of interference at the receiver for the purpose of this test shall be a SINAD ratio, defined in EIA-RS-204-C (1/82), of 12 dB.

(f) The EUT must be shown to meet the emission bandwidth limits for the band in which it is proposed to be used. For systems that produce a line spectrum for the test signals described in §2.985, those input signals shall be used. In other cases a typical input signal shall be used and compliance with the emission bandwidth limits shall be shown by measuring the power within a 100 kHz bandwidth and comparing it to the maximum 100 kHz bandwidth measurement on the inband signal. For frequencies below 1 GHz the quasi-peak detector described in ANSI C63.2 - 1980 shall be used. For frequencies above 1 GHz peak power shall be used with an instrument bandwidth appropriate to the existing service.

4. New Section 2.1103 is added to read as follows:

2.1103 Submission of ATA Grant Application

The applicant for ATA will submit with his application a description of the above test results, a table of derating factors for each transmitter in the EUT along with its frequency relative to the center frequency, and test results showing that the EUT as a whole complied with the out of emission bandwidth standards for the service for which it is intended.

5. New Section 2.1104 is added to read as follows:

2.1104 Transmitter Submission for ATA Grant

The Commission staff will review the application and may request the applicant to furnish a set of transmitters in order to reproduce the tests. If the application is acceptable to the Commission, an ATA grant which gives the power derating which must be used by a licensee in order to use the equipment will be issued.

The authority citation for Part 22 continues to read: Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j) and 303(r) and Section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

6. New Section 22.120(e) is added to read as follows:

22.120 Alternative Type Acceptance

* * * * *

(e) *Alternative Type Acceptance.* In addition to type accepted transmitters, licensees, except those the Cellular Radiotelephone Service, may use transmitters granted alternative type acceptance under §2.1100 *et seq.* provided that the transmitted power is decreased as provided in the alternative type acceptance grant.

The authority citation for Part 74 continues to read: Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j) and 303(r) and Section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

7. Section 74.451(a) is revised to read as follows:

74.451 Type Acceptance of Equipment

(a) *Type Acceptance of Equipment.* Applications for new remote pickup broadcast stations or systems or for changing transmitting equipment of an existing station will not be accepted unless the transmitters to be used have been type accepted by the FCC pursuant to the provisions of this subpart, or have been type accepted for licensing under Parts 21 or 90 of the FCC rules and do not exceed the output power limits specified in §74.461(b), or have been granted alternative type acceptance under §2.1100 *et seq.* and the output power does not exceed the limits in §74.461(b) decreased in accordance with the alternative type acceptance grant conditions.

* * * * *

The authority citation for Part 90 continues to read: Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 154(j) and 303(r) and Section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

8. In Section 90.203, (a) is revised and a new (e) is added to read as follows:

90.203 Type Acceptance Required

(a) *Type Acceptance Required.* Except as specified in paragraphs (b) or (e) of this section, each transmitter utilized for operation under this part and each transmitter marketed as set forth in §2.803 (of Part 2) must be of a type which is included in the Commission's current Radio Equipment List as type accepted for use under this part; or, be of a type which has been type accepted by the Commission for use under this part in accordance with the procedures in paragraph (a)(2) of this section.

* * * * *

(e) Licensees may use transmitters granted alternative type accepted under §2.1100 *et seq.* provided that the transmitted power is decreased from the licensed power as provided in the alternative type acceptance grant and the following eligibility criteria are met

(1) Licensee is an exclusive licensee of the channel or

(2) Licensee furnishes the written consent of all co-channel licensees within a 75 mile radius and receives a license modification allowing use of alternative type acceptance equipment.

Appendix B

Numerical Example of Alternative Type Acceptance and Transmitter Derating

1. For this example, we assume that a licensee is presently authorized a 16K0F3E (formerly 16F3) FM transmission with 10 dBw mobile power and 20 dBw repeater power. The hypothetical proposed equipment for Alternative Type Acceptance (ATA) is a 6 kHz channel system. It is proposed to put one of the subchannels on the center of an existing 25 kHz channel and to center each of two others 6 kHz away from the center channel. The manufacturer proposes to attenuate the side channels 2dB relative to the center channel.

2. In the first ATA test, the desired FM signal level is set to -107 dBm. The undesired FM level is increased until a 12 dB SINAD is reached. This is found to be -100 dBm, which is P_s. The switch is moved for the EUT test and the attenuation is decreased until 12 dB SINAD is reached again. The following individual transmitter powers are then noted:

Frequency relative to channel center (f_i)	P_i	P_i/P_s
–6 kHz	–46 dBm	–6 dB
0 kHz	–44 dBm	–4 dB
+6 kHz	–46 dBm	–6 dB

The same test is repeated for the FM equipment adjusted to the lower adjacent channel and P_s is found to be -41 dBm. The switch is moved again and the following values are found for P_i.

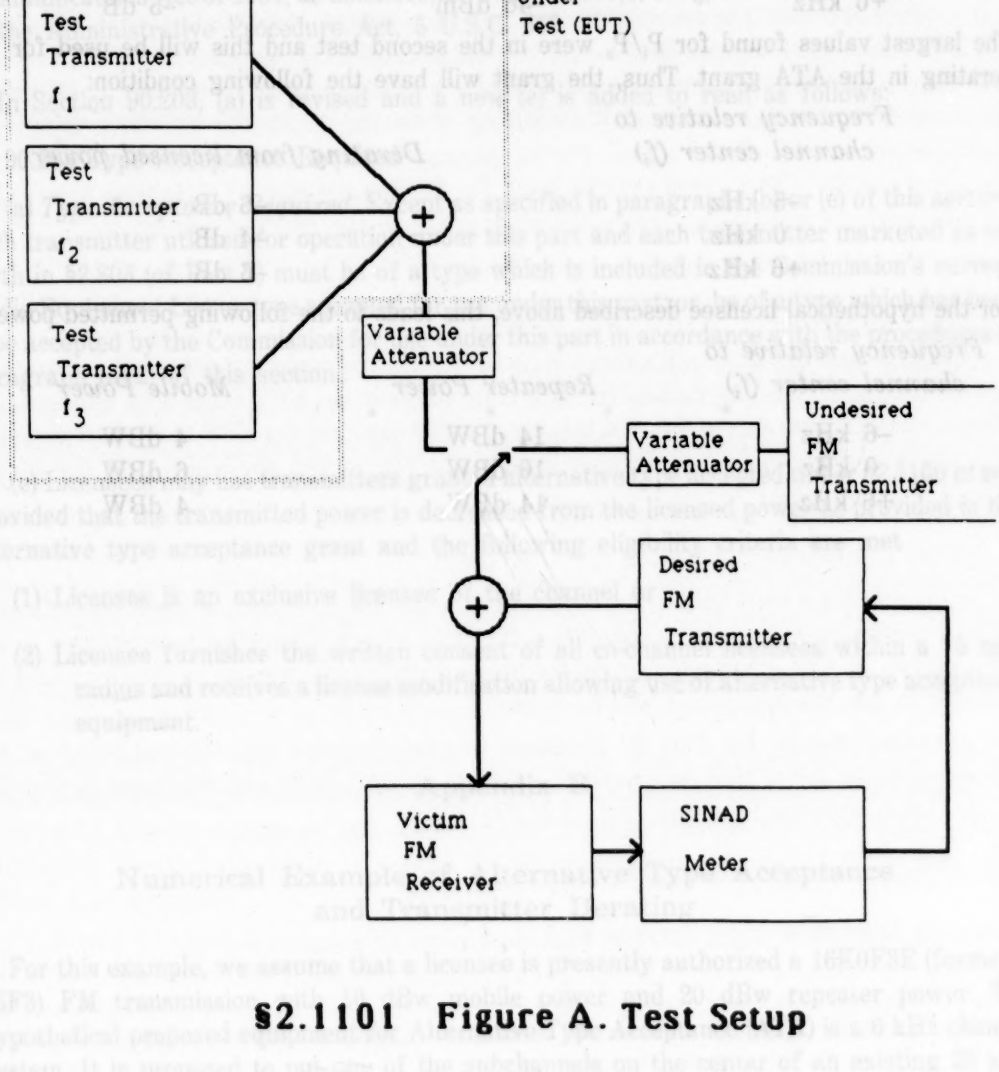
Frequency relative to channel center (f_i)	P_i	P_i/P_s
–6 kHz	–46 dBm	–5 dB
0 kHz	–44 dBm	–3 dB
+6 kHz	–46 dBm	–5 dB

The largest values found for P_i/P_s were in the second test and this will be used for the derating in the ATA grant. Thus, the grant will have the following condition:

Frequency relative to channel center (f_i)	*Derating from licensed power*
–6 kHz	–6 dB
0 kHz	–4 dB
+6 kHz	–6 dB

For the hypothetical licensee described above, this leads to the following permitted powers:

Frequency relative to channel center (f_i)	*Repeater Power*	*Mobile Power*
–6 kHz	14 dBW	4 dBW
0 kHz	16 dBW	6 dBW
+6 kHz	14 dBW	4 dBW



§2.1101 Figure A. Test Setup

Declaratory Ruling
Enhanced Services

In a declaratory ruling interpreting the Computer II definition of "enhanced service," Section 64.702(a) of the Commission's Rules, various Centrex features are found to be permissible adjuncts to basic service. Certain Local Area Signalling Service (LASS) features are also held to be basic. One Centrex feature, Customer Dialed Account Recording (CDAR) is ruled an enhanced service.
—*N. American Telecommunications Assn.*

FCC 85-248

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
North American Telecommunications Association	ENF 84-2
Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment	

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1985; Released: May 29, 1985

BY THE COMMISSION:

I. Introduction

1. We have before us a Petition for Declaratory Ruling in which the North American Telecommunications Association (NATA) asks us to rule that certain Centrex features and certain residential telephone services based on provision of the calling party's telephone number are enhanced services as defined by §64.702(a) of the *Computer II* rules.[1] We find that

[1] 47 C.F.R. §64.702(a); *see* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert.*

with one exception the Centrex features identified by NATA may properly be offered under tariff as part of a basic service. We find that, based on information before us here, the specific services based on the calling party number which the parties have described to us appear to be basic. We recognize that these services may raise some questions about application of our definition of an enhanced service to improvements in the basic network. Since we will be instituting a rulemaking proceeding in the near future to re-examine such questions, however, we defer final resolution of these broader questions pending the outcome of that rulemaking. Finally, we address the role of *Computer II* subsidiaries in supplying CPE behind Centrex and the responsibility of operating companies to make full public disclosure of network interface information, including all information necessary to customer premises equipment (CPE) manufacturers and vendors who wish to provide CPE capable of interacting with Centrex features.

2. The term "Centrex"[2] refers generally to a type of telephone service in which calls among a customer's internal telephone stations (intercom calls) as well as calls between the customer's stations and the rest of the world are switched at the central office of the local exchange telephone company. That switch could be dedicated to one or more Centrex users, but most often it is the same switch that routes other telephone calls. The CPE used with Centrex is provided on a competitive basis by CPE vendors, including the structurally separate subsidiaries of some BOC's.[3] Each main station in a Centrex-based system is connected by a separate loop to the central office. By contrast, in a private branch exchange (PBX) system the lines from each station terminate on the customer's premises

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denied, 103 S. Ct. 2109 (1983); Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies (BOC Separation Decision), 95 FCC 2d 1117 (1984), *reconsideration,* ___ FCC 2d ___, FCC 84-252, (released June 1, 1984), *aff'd,* Illinois Bell Telephone Company v. FCC, 740 F.2d 465 (7th Cir. 1984), *appeal filed,* February 15, 1985. (7th Cir.)

[2] "Centrex" is not a trade name or a service mark. The service features available with Centrex as well as the price structures under which Centrex lines and features are offered vary from state to state. The type of Centrex service discussed in this Order, in which both switching and control of the switch take place in the central office, is sometimes referred to as Centrex-CO to distinguish it from Centrex-CU, a service in which a control unit at the telephone company operates a PBX located on the customer's premises. *See* Comments of U.S. West Companies at 3; *see generally* Engineering and Operations in the Bell System 6, 422 (1970).

[3] Centrex does not require special telephone sets; most commonly-offered Centrex features can be accessed through any ordinary touch-tone telephone. Some manufacturers have developed station sets which are specifically designed to take advantage of and work with special Centrex features, *see* III.D. below. Centrex systems often do require a special attendant console. *See, e.g.,* Letter from Chief, Common Carrier Bureau, to Alfred E. Green, dated July 14, 1983 (grant of interim waiver of *Computer II* rules to permit BOCs to offer no more than 700 50B Centrex consoles on a non-tariffed basis).

in the PBX switch, which is in turn connected to the central office by one or more loops[4] over which pass calls between the customer's stations and the outside world. The switch on the customer's premises switches intercom calls, while calls between the PBX system and the local exchange and toll networks are switched at the central office in a similar fashion as are calls to and from any other customer. Before the introduction of Centrex, telephone company-supplied PBXs were the principal means by which customers with a large number of telephones were able to switch their intercom calls. Today, PBXs supplied on an unregulated basis by CPE vendors, on the one hand, and tariffed Centrex service provided through the telephone company central office combined with unregulated CPE, on the other, are directly competitive alternatives for many business customers.

3. The petition which gives rise to this proceeding focuses not on the essential Centrex switching function, but on special features included in some Centrex offerings. Although Centrex was first offered, and continues to be offered, using the electromechanical No. 5 Crossbar switch, the advent of the electronic switch made possible the augmentation of Centrex with a variety of options provided by means of the stored program control systems characteristic of electronic switching.[5] Many of the same features which have appeared in Centrex are also available through electronic PBXs, or as functions of other CPE.

II. Pleadings of the Parties

4. In its petition, NATA contends that the existence of Centrex in competition with CPE blurs the otherwise clear dichotomy between regulated basic services and unregulated enhanced services, thereby threatening the separation which the Computer II separation conditions require. NATA characterizes Centrex as an anomaly in which basic switching is combined with services which ought to be classified as enhanced because they involve vendor or subscriber interaction with stored information, customer specification of the parameters of the service, or the tailoring of services to meet specific customers' needs. NATA argues that, while the *Final Decision* may be interpreted as having functionally grand-fathered those enhanced services which were part of Centrex at the time the *Computer II* rules became effective, a ruling forbidding the addition of new enhanced services to Centrex is now needed.

5. NATA offers tariff filings by New Jersey Bell, Mountain Bell, Wisconsin Telephone, and Northwestern Bell, as well as a Request For

[4] These loops are often referred to as "PBX trunks." They may be like ordinary business telephone lines, or lines with special signalling characteristics.

[5] *See generally* A.E. Joel (ed.), Electronic Central Office Systems of the World (1976).

Proposals from Ameritech seeking CPE compatible with Centrex, as evidence that the BOCs are expanding Centrex beyond permissible limits. NATA argues that features such as Centrex Customer Change Feature and Automatic Route Selection- Deluxe[6] fall squarely within the definition of an enhanced service. NATA claims that the *Computer II* decisions failed fully to account for the fact that enhanced services can be and are provided by CPE, and urges the Commission to interpret the definition of an enhanced service to include any service capable of being provided by CPE. NATA contends that enhancement of Centrex creates opportunities for cross-subsidization of a competitive service from the monopoly rate base, provides incentives for discrimination against vendors of competing services, and puts the Commission in the position of having to scrutinize each new Centrex feature to see if the additional feature turns Centrex itself into an enhanced service.

6. NATA's position is endorsed by Rolm Corporation (Rolm) and by the Tandy Corporation. Rolm adds that enhancement of Centrex will ultimately harm ratepayers by creating incentives to build too much central office capacity. Tandy urges the Commission to require carriers subject to structural separation to provide all Centrex services through a separate subsidiary.

7. The NATA petition is opposed by the Bell Operating Companies,[7] GTE Service Corporation (GTE), AT&T, Northern Telecom, the International Communications Association (ICA), and the staff of the Michigan Public Service Comission[8] (MPSC). Several opposing parties object to the Petition for Declaratory Ruling as procedurally improper. The combined BOCs contend that Section 1.2 of the Commission's Rules, 47 C.F.R. §1.2, which allows the Commission to issue declaratory rulings, pertains only to adjudicatory proceedings, while Bell Atlantic argues that the issues raised by the petition should be dealt with in a rulemaking proceeding.[9] The Combined BOCs also believe that the NATA petition should be dismissed because it repeats arguments which the Commission has already rejected in its ruling on AT&T's request for an interim waiver prior to divestiture

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[6] Arguments of the parties addressed to particular Centrex features are summarized within our discussion of those features in Section III. A.3, below.

[7] A single opposition was filed by Pacific Telephone and Telegraph Company, Bell Telephone Company of Nevada, and the BOCs comprising the BellSouth, NYNEX, and Southwestern Bell holding companies ("Combined BOCs"). Ameritech, Bell Atlantic, and US West each filed separate oppositions.

[8] The MPSC staff pleading was received March 20, 1984, after the close of the pleading cycle on NATA's petition. In the interest of creating as complete a record as possible for Commission action, we accept this pleading as a late-filed informal comment.

[9] Neither the Commission nor the courts have viewed the Commission's power to issue declaratory orders interpreting its rules as being limited to adjudicatory proceedings. *See, eg,* Orth-o-Vision, Inc., 82 FCC 2d 178, 185 (1980); Viacom International v. FCC, 672 F2d 1034 (2d Cir. 1982).

regarding provision of Centrex 50B consoles. [10]

8. US West contends that, although Centrex is tariffed, it is not a monopoly service. Centrex and PBX are said to have evolved as competitive responses to the same set of needs. It accuses NATA of seeking to place Centrex at a competitive disadvantage which would harm customers who use Centrex. US West states that, while Centrex enhanced services might merit the Commission's attention, none of the features at issue here are anything more than sophisticated basic switching services similar to those offered to all network customers. US West argues that the NATA proposal would require the Commission to treat all Centrex service, as well as other network switching functions, as enhanced, since most switching can also be done by CPE. US West rejects the idea that some longstanding features of Centrex are only permitted because they were functionally grandfathered at the time of the *Final Decision*, noting that none of the *Computer II* decisions mention a category of grandfathered enhanced services. US West also argues that destruction of Centrex by regulation would be unlawful, unconstitutional, and contrary to the public interest, and that the Commission "should be careful in its treatment of this state-tariffed service from the standpoint of exercise of its federal preemptive authority."[11]

9. Ameritech argues that the *Computer II* decisions focused on turning the interstate transmission network into a pipeline and a building block for enhanced services. The Commission never discussed the propriety or workability of applying its basic-enhanced distinction at the local exchange level. Ameritech contends that treating the local exchange just like the interstate network would mean making the facilities available to enhanced vendors through unlimited resale and providing incentives for improvement, conditions which do not exist in the local exchange environment. Ameritech states that *Computer II* requires that basic services be subject to unlimited resale and shared use and that resale and shared use prohibitions have been eliminated from AT&T's interstate tariffs. By contrast, Ameritech observes, similar resale requirements have never been imposed with respect to Centrex. In response to NATA's citation of Ameritech's RFP for Centrex CPE as being replete with enhanced services, Ameritech argues that when the Commission deregulated CPE it fully appreciated that intelligent CPE would function as an enhancement to basic service. The only regulation which the Commission has placed upon the provision of CPE in conjunction with basic service is the requirement of structural separation.

10. Northern Telecom argues that adopting NATA's position would hamper the future evolution of the telephone system by reducing

[10] See n.3, above.

[11] Comments of U.S. West Companies at 17.

incentives for CPE manufacturers to invest in developing Centrex-related software. More serious, according to Telecom, NATA would limit the choices available to small business customers who cannot justify the expense of a PBX. Residential customers would also suffer because new services originally developed for Centrex would not become available to them. ICA argues that none of the features mentioned in NATA's petition are enhanced; that most such features predate *Computer II*, and that PBX manufacturers who believe that Centrex competes unfairly should seek relief from the state commissions which oversee the tariff rates for Centrex. ICA urges that, in light of the concern the Commission has demonstrated for Centrex in its reconsideration of Phase I of the access charge proceeding, [12] the Commission should fully investigate the impact on Centrex users of any action it decides to take in this proceeding. ICA claims that replacement of all Centrex with CPE-based systems would cost $3.8-5.3 billion and take three to five years.

11. GTE states that NATA appears to be seeking restrictions which would apply to every telephone company, whether or not the company is subject to structural separation. Since such relief would, according to GTE, require a substantive change in the *Computer II* rules, NATA's petition should be treated as a petition for rulemaking. GTE also argues that forbidding the upgrading of Centrex would cause stranding of investment, which would not serve the public interest. The Michigan Public Service Commission staff generally supports the positions taken by Ameritech in this proceeding. MPSC adds that the fear expressed by NATA that Centrex will be subsidized by monopoly telephone services is invalid; it believes, on the contrary, that Centrex is subsidizing other basic services.

12. In its Reply Comments, NATA states that it intends neither to preclude the BOCs from using advanced technology in connection with basic services, nor to prevent the sale of Centrex-related CPE by BOC affiliates. NATA insists that its petition does not seek a redefinition of enhanced services, and restates the ruling it requests as follows: "Centrex services may not be expanded to provide any service that has the capability of being provided either as an enhanced service by an independent vendor or as an *enhanced service function* by CPE." [13] In response to the comments of GTE Service Corp., NATA confirms that it expects any company providing tariffed Centrex service to be subject to the restrictions which it seeks to have the Commission apply to the expansion of Centrex features by the BOCs.

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[12] *MTS/WATS Market Structure* CC Docket No. 78-72, 48 Fed. Reg. 10319 (March 11, 1983), *First recon.* 97 FCC 2d 682 (1983).

[13] NATA Reply at 7 (emphasis in original).

13. In Supplementary Comments filed September 6, 1984, NATA brings to the Commission's attention several new allegedly enhanced Centrex features not included in the original petition. These include forwarded call information provided in conjunction with automatic call distribution service, improved versions of station message detail recording, and customer dialed account recording. In addition, NATA asserts that Local Area Signalling Service (LASS), a package of residential services based on access to the calling party's telephone number which is now being market-tested by Bell of Pennsylvania and Southern Bell, is enhanced. [14] Finally, NATA points to what it terms detariffing of Centrex in several states as further evidence that the BOCs themselves do not regard Centrex as a basic service. Rolm Corporation supports NATA's supplementary filing and argues that the BOCs should, at minimum, be required to obtain waivers for the services NATA and Rolm believe to be enhanced.

14. The BOCs respond to NATA's supplementary pleading with descriptions of the features identified by NATA as enhanced. They argue that each is a proper adjunct to basic service. They contend that categorization of LASS-type services as enhanced would retard introduction of technological improvements into the network, contrary to Commission policy and the public interest. They accuse NATA of seeking undue competitive advantage for PBXs at the expense of Centrex. They also argue that the tariff status of a service is irrelevant to its classification as basic or enhanced.

15. Citing what it sees as a lack of verifiable information to assess NATA's claim, ICA urges the Commission to institute a full investigation prior to ruling on the status of Centrex and LASS-type services. The BOCs respond that they have provided sufficient information to enable the Commission to resolve the issues at hand and that further factual investigation is not necessary.

III. Discussion

16. The NATA filings and the responsive pleadings raise the following issues: (1) Do any of the specific Centrex features complained of by NATA constitute enhanced services as defined by Section 64.702(a) of the Commission's Rules? (2) Does the provision of the calling party number, or of services based on the use of the calling party number, constitute an enhanced service? (3) Must we, in order to obtain the goals of the *Computer II* regulatory scheme, interpret or amend the rules to define as enhanced, any service which may be provided by CPE? (4) Does the provision by a BOC's *Computer II* subsidiaries of CPE specially designed

[14] See Section III.B. below for detailed descriptions of, and arguments addressed to, these services.

to work with a BOC's Centrex offering pose any special problems with respect to compliance with structural separation? Each of these issues is addressed separately below.

A. Centrex Features and the basic/enhanced dichotomy

1. Background

17. The problems presented by the use of the inherent processing capacities of the electronic central office to provide optional Centrex features and improvements are not new. Review of the evolution of the current definition of an unregulated enhanced service reminds us that, in every regulatory approach since the *First Computer Inquiry (Computer I)*,[15] we have classified certain legitimate uses of computer processing as necessary to provide regulated telecommunications service.

18. The introduction of the electronic switch in telephone company general offices, which made possible the Centrex features at issue in the instant proceeding, was also one of the events which gave rise to *Computer I*.[16] In an era when data processing services were provided through large, centrally located computer facilities, the development of the central office into a species of computer raised questions about the Commission's regulatory responsibility with respect to data processing and also about the proper role of common carriers in the provision of data processing services. In *Computer I* we made the fundamental determination not to exert Title II jurisdiction over the data processing industry. The line between data processing and message switching became the line between regulatory forbearance and regulation as a common carrier.

19. Even as we drew this line, however, we recognized that it was clearer in concept than in application, since service offerings were already in existence which combined data processing and message switching functions. We adopted a series of definitions which classified such "hybrid" integrated service offerings as data processing or as communications according to the essential nature or primary thrust of the service.[17] In order to assure that those common carriers able to engage in unregulated activities would participate fairly in the competitive data

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[15] Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities, 28 FCC 291 (Tentative Decision), 28 FCC 2d 267 (Final Decision), *aff'd in part* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, 40 FCC 2d 293 (1973).

[16] The first electronic controlled central office went into operation in the early sixties and the first Centrex program for the electronic switch appeared shortly thereafter. Computer I was initiated in 1966, partly in response to allegations that data processing companies were offering services which might constitute common carriage, and that common carriers were about to start using their new electronic switches to offer data processing services. *See* Report and Further Notice of Inquiry, 17 FCC 2d 587 (1969).

[17] 47 C.F.R. §64.702(a) (1979).

processing market, we required common carriers to furnish data processing services through separate corporate entities, using computer facilities separate from those used for regulated services. The *Computer I* rules thus forbade use of the central office switch to provide data processing services but permitted use of the switch to provide certain "hybrid communications services" which incorporated data processing functions.

20. When technological developments began to render inadequate the definitional structure of *Computer I*, we opened the *Second Computer Inquiry (Computer II)*. Initially we proposed simply to redefine the category of computer uses which would fall on the unregulated "data processing" side of the line we had drawn in *Computer I*.[18] Under this proposal, common carriers would have been permitted to use their computers for any purpose not within the definition of data processing. We posited two categories of computer uses which fell outside our definition of data processing: (1) network control and routing, which included, among other functions, use of switching computers to perform ancillary services such as automatic call forwarding, abbreviated dialing, restricted dialing, and special announcements; and (2) input/output processing, which made disparate computers able to communicate with one another.[19] While *Computer II* was in progress, however, AT&T sought for the first time to offer under tariff computer processing capabilities contained in terminal equipment rather than in a central computer.[20] We then expanded the *Second Computer Inquiry* to include the issues raised by "smart" CPE capable of performing data processing functions. We proposed a revised definition of data processing which would have applied to any information processing regardless of whether the processing took place in the network or in CPE, but we also raised the question whether it was still possible to base application of a regulatory scheme on a definitional distinction between data processing and communications.[21]

21. The *Tentative Decision*[22] in *Computer II* proposed a new structure for the provision of common carrier services as well as yet another set of definitions. Three types of common carrier services — basic, basic

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[18] Amendments of Section 64.702 of the Commission's Rules and Regulations, 61 FCC 2d 103, 111 (1976).

[19] *Id.* 109-110.

[20] *See* American Telephone and Telegraph Co. (AT&T) Revisions to Tariffs FCC No. 269 and 267 Relating to Dataspeed 40/4, 62 FCC 2d 21 (1977), *aff'd sub nom.* International Business Machines Corporation v. FCC, 570 F.2d 452 (2d Cir. 1978).

[21] Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer Inquiry), Supplemental Notice, 64 FCC 2d 771, 778 (1977).

[22] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Tentative Decision and Further Notice of Proposed Rulemaking, 72 FCC 2d 358 (1979).

non-voice, and enhanced non-voice — were identified. We proposed allowing carriers owning transmission facilities to provide enhanced non-voice services only through separate subsidiaries. Those subsidiaries would acquire transmission capacity under tariff like other resellers. This scheme required a rather complex definitional structure to distinguish those ENV services which resale carriers would offer as tariffed communications services from those which could be offered as unregulated data processing services.

2. Computer processing adjunct to basic services under the current rules

22. The *Computer II* rules which now govern the provision of telecommunications services are built on the resale concept put forth in the *Tentative Decision*, but employ a different definitional scheme. Enhanced services are defined in Section 64.702(a) as

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

23. A basic service, on the other hand, is an offering of transmission capacity between two or more points suitable for a user's transmission needs, and subject only to the technical parameters of fidelity and distortion. In offering a basic transmission service, a carrier offers a pure transmission capability that is virtually transparent in terms of its interaction with customer supplied information. 77 FCC 2d at 420. In contrast to previous rules and proposals, this definitional structure does not describe the permissible uses of computer technology in the provision of basic service. It is clear, however, that although we drew the rules so as to limit the scope of tariffed basic service to the provision of a pure transmission capacity, we did not intend that our definition of enhanced services should be interpreted as forbidding carriers to use the processing and storage capabilities within their networks to offer optional tariffed features which facilitate use of traditional telephone service. Accordingly, the *Final Decision* carried forward from the *Tentative Decision* our recognition that there are computer processing services which may be offered in conjunction with basic telephone service:

> At footnote 60 of the *Tentative Decision* we stated that we are not foreclosing enhanced processing applications from being performed in conjunction with "voice" service. We indicated that "computer processing applications such as call forwarding, speed calling, directory assistance, itemized billing, traffic management studies, voice encryption, etc., may be used in conjunction with 'voice' service. Accordingly, we are not here foreclosing telephone companies from providing to consumers optional services to facilitate their use of traditional telephone service. Any option

> that changes the nature of such telephone service is subject to the basic/enhanced dichotomy and their respective regulatory schemes. For example, voice storage or automatic call answering within the network would be enhanced services. (citation omitted). Thus any tariffed optional services must not change the nature of traditional telephone service.[23]

The parties to the instant proceeding disagree over the intent of this passage. NATA reads it as the functional equivalent of a grandfather clause granting permission to carriers to continue offering under tariff certain existing enhanced services,[24] while opponents treat the paragraph as strongly supportive of their claims that current Centrex features similar to the features exemplified therein are basic.[25] We do not view ¶98 of the *Final Decision* as merely a grandfather clause. We do, however, find that examination of both the nature and purpose of the features approved in ¶98 can aid us in determining the status of other optional features not specifically delineated in *Computer II.*

24. The computer processing services we there recognized as permissible adjuncts to basic services are services which might indeed fall within possible literal readings of our definition of an enhanced service, but which are clearly "basic" in purpose and use and which bring maximum benefits to the public through their incorporation in the network. The FCC has explicitly rejected the notion that the public interest would be served by prohibiting intelligence or new optional features from the basic network. While we believe that data processing services, as such, and information storage and retrieval services are most appropriately offered outside the sphere of regulation, we have always wanted to encourage network improvements which bring benefits to large and small consumer alike.

25. In speed dialing, for example, a list of numbers designated by a customer is stored in memory within a central office in such a way that, after accessing the speed dialing feature, the customer may use one or two digits to dial a number on that list. Customers can change their lists by inputting information from their telephone sets. Speed dialing, therefore, can be said to involve "customer interaction with stored information," in the sense that the customer stores information in the network and then later changes that information. Call forwarding similarly allows the customer to "program the central office switch" to redirect calls to a particular line, and then later to interact with the previously stored information to change or cancel the instruction. Compu-

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[23] *Final Decision,* 77 FCC 2d 395 at 421, (¶98). *See also Custom Calling II* 88 FCC 2d 1 (1982) (denying request for waiver of §64.702(a) to allow AT&T to offer on an unseparated basis a voice store and forward service involving subscriber interaction with stored information.)

[24] See NATA Petition at 12, NATA Reply at 10-13.

[25] *See* Combined BOC Opposition at 9; AT&T Response at 2-3.

ter-provided directory assistance involves the provision to the customer of "additional, different, or restructured information," and involves some subscriber interaction with stored information, as does the provision of traffic management studies. The purpose served by each of these services, and the relationship of each to basic telephone service, distinguishes these adjunct services from technologically similar enhanced services.

26. In the case of speed dialing and call forwarding, the stored telephone numbers specified by the customer and the customer's interaction with that stored information serve but one purpose: facilitating establishment of a transmission path over which a telephone call may be completed. The significance of purpose in identifying a "basic" adjunct to basic service is perhaps most clear in the case of directory assistance. When a customer uses directory assistance, that customer accesses information stored in a telephone company data base. Ordinarily, assuming the data base was in a computer, such a service would be considered enhanced. "Dial-it," for example, was a service offered by AT&T which allowed information about news, stock prices, etc., to be stored within the network for retrieval by subscribers. In the *Reconsideration*, we found Dial-it to "constitute more than the common carrier offering of a channel of communication and [therefore to] clearly fall outside the scope of a basic service."[26] The only significant difference between Dial-it and directory assistance is that the latter service provides only that information about another subscriber's telephone number which is necessary to allow use of the network to place a call to that other subscriber. An offering of access to a data base for the purpose of obtaining telephone numbers may be offered as an adjunct to basic telephone service; an offering of access to a data base for most other purposes is the offering of an enhanced service. Likewise, data concerning a customer's telephone usage may be gathered, stored, processed, and provided to a customer in the form of an itemized bill or a traffic management study as part of basic service only because the data provided is about the customer's telephone service itself.

27. Another characteristic of a "basic" adjunct to basic service is that it does not alter the fundamental character of telephone service.[27] The distinction between call forwarding and the voice storage services in *Custom Calling II* service illustrates this principle. Allowing a subscriber to reroute calls to another number does not materially change the nature of a telephone call placed to that subscriber. The result of the re-routing is that, if the telephone to which the call is routed is picked up, the customers obtain an open transmission channel between their telephones;

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[26] *Reconsideration* 84 FCC 2d 50, 55.

[27] Final Decision at 421.

in other words, they get ordinary, basic telephone service. By using a voice mailbox-type service, on the other hand, subscribers obtain the use of a storage facility into which messages can be placed for later retrieval. A transmission channel is not created between caller and the intended destination of the caller's communication. Such a service has, accordingly, been found to be enhanced, because it employs subscriber interactions with stored information for the purpose of providing a service which is not a basic transmission channel.[28]

28. The foregoing discussion of the basic/enhanced dichotomy and the exceptional category of applications which are adjuncts and improvements to basic service applies to Centrex and Centrex-like offerings in the same fashion as it applies to other common carrier network services. Carriers may not include enhanced services within tariffed Centrex service, and carriers subject to structural separation must offer enhanced services for use with Centrex only through a separate subsidiary. In our *Computer II* decisions we did not "grandfather" Centrex or any particular Centrex features as such; we addressed, rather, the adjunct category. Therefore, the date on which a Centrex feature or its ancestor was first offered is irrelevant to determining the status of that feature and the fact that a service predated *Computer II* would not preclude a finding that it is an enhanced service. Any Centrex feature, then, which falls within the definition set out in §64.702(a) will be considered enhanced unless it falls within the narrow category of adjunct services which facilitate use of the basic network without changing the nature of basic telephone service.[29]

3. Analysis of specific Centrex features

29. NATA's petitions allege that the following tariffed Centrex features are enhanced services: Centrex Custom Change Feature (CCCF), Automatic Route Selection-Deluxe (ARS-D), Facility Restriction Levels, Deluxe Queuing, Facilities Administration and Control, Traffic Data to Customer (pollable), and Automatic Overflow to DDD, forwarded call information, and station message detail recoding/customer dialed account recoding (SDAR/CDAR). Each of these features is analyzed separately below.

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[28] *See* Reconsideration at 55; Custom Calling II, *supra* n.28.

[29] We thus reject Ameritech's assertion that, because we have never prohibited resale restrictions in state Centrex tariffs, the basic/enhanced dichotomy has not been applied to local exchange and central office switching facilities. The Computer II rules govern common carrier provision of enhanced services via "common carrier transmission facilities used in interstate communications." 47 C.F.R. §64.702(a). Centrex lines and the switching equipment which provides Centrex service are used to complete and initiate interstate calls; therefore, the basic/enhanced dichotomy applies.

a. Automatic Route Selection, Facilities Restriction Level, Facilities Administration and Control

30. Automatic Route Selection is a feature which allows a customer who has access to more than one type of service for outgoing calls to specify preferred routing for various types of calls. For example, a customer could specify that calls to city A will be routed via an FX trunk, with WATS, as a second choice, while calls to City B, on the other hand, could be routed to one carrier during business hours and another carrier at night. Calls to City C could be completed on WATS if available and otherwise not completed at all.[30] A Facilities Restriction Level is used with ARS-D to determine the types of calls which can be made over a particular line, while Facilities Administration and Control is used to prevent a particular telephone station from being used to access Centrex features that the customer does not wish to have used from that station. NATA argues that the customer's ability to specify preferences which control routing of calls over the network, and to cause the information directing those preferences to be carried out to be stored in the network in this manner as part of the program controlling his Centrex service renders these features enhanced. NATA also regards provisions allowing a customer to override restrictions on facilities use by dialing an authorization code as "interaction with stored information" which render these features enhanced. The BOCs argue that this use of processing capabilities of the switch to route calls according to a customer's desires is similar to call forwarding and should therefore be allowed as an adjunct to basic service.

31. We find the analogy to call forwarding to be persuasive. Even if ARS and associated restrictions on uses of lines and features can be said to involve interaction with stored information (the FRLs and routing specifications), the purpose of this use of the central office computer is simply to facilitate the routing of ordinary telephone calls. The customer is relieved of the necessity of deciding how a call should be routed each time a call is made, but the result of each call is no more than the creation of the transmission channel chosen by the customer. ARS, as described in NATA's pleadings, facilitates use of basic service without changing the nature of the basic service. These features therefore are not enhanced services.

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[30] Automatic Route Selection differs from Least Cost Routing in that ARS requires the customer to determine the preferred routing for various categories of calls. Once the customer's specifications are programmed into the switch, they remain the same until the customer decided to change them. Least Cost Routing, by contrast, involves choice of the least expensive route for any call.

b. Deluxe Queuing, Automatic Overflow to DDD

32. Queuing allows an attempted call to be "held" until it can be completed, if the intended route for the call is unavailable at the time the call is placed. The "holding" of the call can be accomplished with the calling telephone off hook or on hold; in the latter case, the calling telephone rings when the call is completed. "Automatic Overflow to DDD" is the name of a feature which causes calls placed on a subscriber's private line network to be rerouted to the toll network if all tie-line routes are busy. NATA's petition states that the status of these features is ambiguous because "it is not clear whether the customer can initiate or control the feature without telephone company intervention." Opponents argue that these features are only aspects of basic routing and switching, regardless of how they are controlled.

33. We find these Centrex features to be parts of a basic transmission service. In the *Final Decision*, at 420, we stated that "in a basic service, once information is given to the communication facility, its progress towards the destination is subject to only those delays caused by congestion within the network or transmission priorities given by the originator." We thereby recognized that the concept of a pure transmission path was not so limited that any "basic" call must be abandoned if it cannot proceed immediately to completion on the very first attempt. Queuing and automatic overflow employ some intermediate storage of the routing information within the network to help complete calls which were delayed by congestion in the network, but they neither alter the nature of the transmission service which the customer obtains nor involve subscriber interaction with stored messages, the subject of *Custom Calling II, supra*. As with call forwarding, the introduction of the capacity for customer activation of queuing or automatic overflow may place these services in the "adjunct to basic" category described in paragraph 98 of the Final Decision, but does not render them enhanced.

c. Centrex Customer Change Feature

34. CCCF, as described in the New Jersey Bell tariff appended to NATA's petition, allows the customer to use a data terminal on his premises to transmit to the central office desired changes in the customer's Centrex service. This service automates the usual service order process, which generally involves submission of the order on paper, if the order is long or complex. NATA stated in its original petition that it did not know whether the New Jersey CCCF offering involved direct customer programming of the switch or merely provides a fast means of communicating a service order to telephone company personnel who then

implement service changes.[31] NATA claimed, however, that available evidence seemed to indicate that the BOCs intended ultimately to develop the CCCF offering in such a way that customers would have access to the switching software for the purpose of rearranging their own Centrex lines and features. In its supplementary filing, NATA offers additional evidence that CCCF-type features will soon allow Centrex users to "program the central office switch" themselves.[32] NATA argues that these services, like ARS, Deluxe Queuing, and Automatic Overflow to DDD, are enhanced because they involve "customer interaction with stored information." BellSouth states that its Customer Station Rearrangement feature is currently only a mechanized means of entering a service order, but confirms that it anticipates that customer will eventually be able to enter changes directly into the switch. Ameritech argues that its Customer Originated Moves and Changes capability is even less like an enhanced service than call forwarding or speed dialing because it involves, at most, customer control of the software equivalent of an on/off switch for each Centrex feature.

35. We find that, even if CCCF-type arrangements do require a customer to interact with the information within the switch which states the parameters of his Centrex service, these service ordering automation arrangements are not enhanced services. The customer's interaction with the information in the central office computer serves no purpose beyond facilitating use of basic telephone services. Moreover, the ability of the customer to add or remove various basic service features does not change the kind of telephone service he will get when he places a call. Thus, the current and potential CCCF features described by NATA and the BOCs, may be considered adjuncts to basic telephone service.

d. Traffic Management Data (pollable)

36. We have already determined that traffic management studies may be provided by carriers under tariff because the information so provided is directly related to management of the customer's telephone service and does not change the nature of basic telephone service.[33] The "pollable" feature allows the customer to obtain traffic information directly from his stations instead of having the telephone company collect the information

[31] *See* NATA Reply, Exhibit B (excerpt from transcript of testimony of Carol Whitten Ellis before Public Utilities Commission of California, discussing plans of Pacific Telephone and Telegraph Company for "electronic customer-controlled feature and station rearrangements").

[32] Supplemental Comments (September 6, 1984) Exhibit C at 6 updated excerpt from testimony L.R. Armagost, Illinois Bell Telephone Company, before the Illinois Commerce Commission, describing a Customer Station Rearrangement feature allowing "direct customer control of individual station features."

[33] Final Decision at 421.

and send it to him. Just as the mechanization of credit card billing did not change itemized billing service into an enhanced service[34], and automation of a service ordering process similarly does not do so (para. 34, *supra.*), so the automation of the means of supplying traffic data to customers does not render provision of traffic management data an enhanced service.

e. Forwarded Call Information

37. In its Supplemental comments, NATA identifies an allegedly enhanced feature called Forwarded Call Information which is being offered by some BOCs in conjunction with central office automatic call distribution systems as well as with Centrex systems. As described in a Pacific Bell tariff filing in the record herein, Forwarded Call Information provides information about lines that are equipped with call forwarding features. The following information concerning calls which are forwarded from one of a subscriber's stations to another one of that subscriber's stations is sent on a separate data channel to a customer-provided data modem: (1) The number of the station originally called; (2) A status code indicating the reason for forwarding; (3) A two digit code indicating which automatic call distributor or uniform call distributor is involved; (4) A code indicating which line the call was sent to; (5) The calling number - if the call originated within the same Central Office. This information can then be used by the customer to automatically route messages to the proper attendant (via a customer-provided computer) and display the information on a CRT. The customer is responsible for providing necessary equipment and data modem in order to utilize this feature.[35] NATA argues that Forwarded Call Information is enhanced because it provides the subscriber with additional information that is generated in the network rather than transmitted by the caller. Furthermore, according to NATA, this services goes beyond the switching and routing involved in ordinary call forwarding because it provides information — such as the reason for the transfer and the caller's number — not needed for the purpose of completing the call. Instead, argues NATA, this information is provided for purposes such as answering bureau and mailbox applications, both of which it claims are clearly enhanced services.

38. BellSouth, which offers a similar feature called Simplified Message Desk Interface, argues that it "facilitates use of, but does not change" traditional telephone service. BellSouth contends that since this feature provides the customer only with calling information that exists in

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[34] *See* In the Matter of Datapoint Corporation, ENF File No. 82-2, (released March 10, 1983) (decision by the Chief, Common Carrier Bureau).

[35] Pacific Bell Advice Letter No. 14767, addressed to Public Utilities Commission of the State of California (July 10, 1984), attached as Exhibit A to NATA Supplementary Comments (September 6, 1984).

the network, it should not be viewed as providing new or additional information. Providing the called number for the Centrex attendant to view on a CRT is, according to BellSouth, no different in nature than providing that same information by means of a light on the attendant console. BellSouth similarly argues that providing the "reason" for the forwarding of a call actually involves nothing more than utilizing line status information to advise the attendant whether the called station was busy or did not answer. Furthermore, BellSouth states, the fact that the information provided is similar to that provided to interexchange carriers under Feature Group D, demonstrates the inappropriateness of calling the provision of such information "enhanced". BellSouth points out that any call answering or mailbox applications which make use of the forwarded call information are actually provided by terminal equipment belonging to the customer. BellSouth states that such equipment can be obtained from various vendors and need only be compatible with a conventional asynchronous 1200 baud ASCII interface. Finally, BellSouth notes that the calling information it provides to the customer's premises is not available anywhere outside the network and cannot be provided through CPE.

39. We find that the forwarded call information features described by NATA and by BellSouth do not provide the customer with "additional different, or restructured" information within the meaning of Section 64.702(a). [36] Rather, they represent use of the processing capabilities inherent in the electronic switch to facilitate the subscriber's ability to make use of the basic switching and transmission service obtained from the operating company. Most of the features in issue here revolve around display to the customer of information about the status of the customer's own lines and incoming calls. (The provision of the number of the calling party, involved here to a limited extent, is discussed more fully in Sec.B, below.) Such line and call status information is always present in the network in the form of electrical signals such as on-hook, off-hook and busy signals. [37] Traditional Centrex consoles can detect those electrical signals and display the status of lines with glowing or flashing lights. The progress of an incoming call can be followed by watching the lights go on and off. Now, this same line and call status information can, at the customer's option, be provided in a form which allows the customer's processor to cause the information to appear as an alpha numeric display.

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[36] We have previously observed that the number of the called party may be thought of as part of the information transmitted by the calling party, and that CPE arrangements which make use of that number are not "enhanced" by virtue of the conversion of the pulses or codes corresponding to that number into form usable by the CPE. Protocols Inquiry, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 588 (1983).

[37] See *id.* at 590-591.

As long as the line and call status information is simply reported to the customer's premises, and all further processing of that information takes place within CPE, no "additional" information is provided and the service is not enhanced. Furthermore, to the extent that the protocol of such information is converted, such conversion may be associated with basic service as part of the call setup, routing and cessation signalling that may be converted at will. Protocols Inquiry, 95 FCC 2d 584, 590 (1983).

40. Even if the definition of an enhanced service could be given the expansive interpretation favored by NATA, policy considerations would counsel against doing so. Provision of forwarded call information in a convenient data format should encourage CPE vendors and software developers to create new ways to use this data for the improvement of the customer's telephone service and for the customer's own business purposes. On the other hand, the strained reading of the rule proposed by NATA would deprive both the public and the CPE manufacturers of the benefits which might flow from efficient, innovative use of this information by intelligent CPE. Furthermore, NATA's interpretation of the rule might have unexpected results for PBX vendors and for providers of answering services and other enhanced services. This is because the provision of forwarded call information to the Centrex customer appears to be conceptually indistinguishable from the provision to the customer's premises of the call data necessary to PBX direct inward dialing, PBX automatically identified outward dialing, and to the concentration of calls on trunks running from a central office to an answering service switchboard. Thus it appears that the most reasonable interpretation of the rule, which allows transmission of existing line/call status information to the customer in data form as part of basic service, is also an interpretation which promotes efficiency and which encourages competitive development of CPE which can be tailored to individual consumer's needs. We will not reach out for the contrary result.

f. Station Message Detail Recording/Customer Dialed Account Reading

41. Station Message Detail Recording (SMDR) provides the Centrex customer with a record of the date, time, duration, and called number of each outgoing call. The information is provided to the customer on paper, on computer tape, or in some instances by on-line transmission. Customer Dialed Account Recording (CDAR) allows a customer to "tag" outgoing calls appearing on the SMDR record with account numbers of the customer's choosing; this is done by dialing the account number to be associated with a call before dialing the call. It is also possible to affix account numbers to the records of incoming calls which are forwarded to another station by the Centrex attendant. NATA argues that both of

these features fall within the definition of enhanced services because, to provide these services, an electronic central office switch captures information not transmitted by the caller, such as the duration of a call, and transmits that additional information to the customer's terminal equipment. NATA accepts that SMDR by itself probably falls within the ambit of paragraph 98 of the *Final Decision*, but contends that CDAR is clearly an enhanced service because it allows the customer to use the central office switch for storage and retrieval of data for purposes related, not to use and management of telephone service, but to the customer's own business cost accounting process. The BOCs respond that these features are not new and that they are basic because they provide information about the customer's use of his telephone.

42. While SMDR by itself may be offered as an adjunct to basic service, we agree with NATA that the Customer Dialed Account Recording feature described in the pleadings here appears to be an enhanced service. Using this feature, an attorney, for example, could assign a unique account number to each client. He could then "tag" every call made on a client's behalf with that client's account number. The station message detail report for his Centrex system would then contain, not only telephone company generated information describing the use of each telephone station, but also the lawyer's own information indicating the business purpose of each call and the client to whom the lawyer's time which was consumed by the call should be billed. This use of the electronic switch for storage and retrieval of a customer's business information, where that information is not used in the provision or management of the customer's telephone service, is squarely within the definition of an enhanced service. It may not, therefore, be provided under tariff; and, in the absence of a waiver, companies subject to structural separation may not provide the service within the network.

B. Local Area Signalling Service

43. In its supplemental comments NATA expands its petition to include local area signalling service (LASS), a package of features being offered to non-Centrex customers in several test markets. LASS uses common channel interoffice signalling (CCIS) circuits to transmit the calling party's number, along with other signalling information, to the receiving central office. NATA and the BOCs describe the following services and features which can be provided with LASS:

44. *Call Monitor.* Call monitor allows customers having appropriate CPE to identify a calling party's telephone number. During the ringing stage of the call, the Central Office transmits the telephone number of the calling party to the customer's equipment. This telephone number is then displayed by the special CPE. Calls from other than individual lines, or

calls from telephone numbers that have been marked as private, cannot be identified. A calling customer may also mark an individual call as private by dialing a privacy access code before originating a call.

45. *Call Trace.* This feature allows the customer to cause the last call received to be traced and the number from which it originated to be transmitted to the police and/or to the telephone company.

46. *Preferred Call Forwarding; Call Block; Call Selector.* Preferred call forwarding allows customers subscribing to call forwarding to specify which incoming calls they want forwarded. Call block allows a customer to block unwanted calls from designated numbers. Call Selector allows customers to specify telephone numbers that will cause a unique ring or call waiting tone.

47. *Call Return; Repeat Dialing.* The call return feature allows a customer to place a call to the last number that called his line without actually dialing the number. Repeat dialing allows the customer to place, without redialing, a call to the last number he called.

48. *Call Tracking.* Call Tracking is a service for business customers that allows them to identify calling parties' telephone numbers. Within a half second of the call's arrival at the Central Office, the customer receives via a private line channel the hour, minute, and second of the call's arrival, the number called, and the calling party's telephone number. It also indicates the status of the called number (busy or idle). This information is displayed and formatted by the customer's teletypewriter or computer terminal on the customer's premises.

49. NATA argues that each of these offerings must be considered enhanced because it employs computer processing applications that provide the subscriber additional information not transmitted by the caller. NATA also contends that these features cannot be considered adjuncts to basic service because they serve "new and different" purposes such as helping customers screen or pre-select callers for acceptance or rejection.

50. As noted previously, the BOCs argue that the number of the calling party is part of the signalling information transmitted with the call and does not, therefore, constitute additional information. Bell Atlantic points out that the calling party number is used in providing 911 emergency service and is also provided to interexchange carriers as part of equal access. The BOCs analogize the call return and redial features to speed dialing and call forwarding. BellSouth argues that denying the operating companies the ability to use CCIS circuits in revenue-producing ways could cause the companies to decide not to extend CCIS to their end offices. In this regard, BellSouth points out the the Commission has previously recognized that failure to deploy local CCIS channels could retard the improvement of the basic network, and adds that features such

as call block and distinctive ringing promote efficient use of the network by making it unnecessary for customers to resort to wasteful strategems such as leaving phones off-hook to avoid unwanted calls or signalling one another with a prearranged number of rings in order to assure that desired calls are answered. The BOCs also argue that these features do not change the nature of basic telephone service, but only facilitate its use by the customer.

51. NATA responds that there is a point where improvements to a basic service cause it to evolve into something more than traditional, plain, old telephone service. These features mark that point, NATA claims, arguing that calling the LASS features a mere improvement on basic telephone service is like calling the human being a mere improvement upon the ape from which it evolved.

52. We find that the calling party number, like the other signalling information discussed above, is not additional information in the sense intended by Section 64.702(a), and that even if it might be so considered it should not be so treated. That number may be thought of as representing, in different form, the type of information communicated by the caller's loop to the local central office when it enters the "off-hook" state, i.e., the identity of the loop. In that sense it is part of the caller's transmitted information. Also, such information is often transmitted forward to other central offices in digital form. Provision of this part of the calling party's transmission to the called premises thus does not represent an addition to the original transmission. Provision of this information might even be viewed as a means of increasing the transparency of the network to the transmissions of customers, since the operating company is no longer removing the signalling information but is instead passing it on for whatever use the called party can make of it. More fundamentally, if such information is not permitted to be sent forward to the called party's CPE or to a Centrex providing comparable services, obviously useful new services will be denied the public since the information cannot otherwise be generated in terminal equipment. Importantly, we observe that the calling party identification information will not be restricted to Centrex services. Such a restriction would seriously disadvantage users and suppliers of PBXs who would not be able to create comparable services. Thus, our ultimate choice is between denying the public new service features, or facilitating the availability of such features, with both Centrex and PBX capable of creating them. In such circumstances, even if this decision were close — and we believe that it is not — we would balance on the side of treating them in the adjunct category.

53. We recognize that these innovations, which allow increased customer control over switching and routing calls, could be applied in

ways which cross over the line between basic and enhanced services.[38] However, based on the record before us here, we cannot conclude that any of the features described by the parties go beyond providing a basic transmission channel and facilitating the customer's use of that transmission channel. We do expect, though that before any operating company decides to offer any of these services on an ongoing basis, it will carefully evaluate its offering to determine whether any part thereof constitutes an enhanced service, and seek any necessary waiver in a timely fashion.[39]

C. Proposed Redefinition of Enhanced Services

54. NATA's petition asks us to define enhanced service to include any service capable of being provided as a function of CPE. NATA claims that this restriction on basic service is needed to reduce opportunities for operating companies to discriminate against independent CPE vendors and to cross-subsidize competitive services from the monopoly revenues. We reject this approach because it goes beyond what could be accomplished in the context of a declaratory ruling; we treat it, instead, as a petition for rulemaking. We will soon adopt a Notice of Proposed Rulemaking which looks toward possible changes in the treatment of enhanced services, Section 64.702(a).[40] For this reason, we do not address this aspect of NATA's proposal at this time.

D. Centrex and Centrex-compatible CPE

55. NATA's petition offered as an example of improper "enhancement" of Centrex a Request for Proposals issued by Ameritech in June, 1983, seeking quotes on various items of CPE, many of which were required to be compatible with Centrex. The exact nature of NATA's objection to the RFP is unclear, since, even under NATA's interpretation of the basic/enhanced dichotomy, it would seem that "enhancement" of Centrex with features located in CPE would be unobjectionable as long as the CPE were not offered by the basic service provider. Indeed, it may be that the Commission's action in the *BOC Separation Order* requiring BOCs to provide CPE and enhanced services only through separate

[38] *See, e.g.*, AT&T, Revision to Tariff FCC No. 259 (WATS) for Advanced 800 Service, FCC 84-562, (released November 30, 1984).

[39] We remind the BOCs that the fact that a service cannot be provided outside the network does not preclude that service from being found to be enhanced, although it may be a factor in granting a waiver to allow such a service to be provided on a collocated basis. We also note that our ruling herein with respect to LASS-type services is strictly limited to the specific services described in paras. 43-47 above.

[40] The forthcoming proceeding will address the kinds of enhanced services involved in the instant proceeding and will also deal with questions relating to the treatment of protocol conversion under Sec. 64.702(a). *See* Petitions for Waiver of Section 64.702 of the Commission's Rules (Asynchronous -X.25 protocol conversion waiver), Memorandum Opinion and Order, FCC 85-101, para. 9 (released March 26, 1985).

subsidiaries has alleviated some of the concerns that lead NATA to focus part of its petition on the Ameritech procurement effort. We do understand, however, that the provision by a BOC subsidiary of CPE specifically intended for use with a BOC's Centrex offering[41] raises concerns which warrant our attention. In particular, the apparent desire of Ameritech to obtain sophisticated software-driven CPE which may be programmed to work with the Centrex software resident in the central office, and which may be easily adapted to future changes in central office programming[42] highlights the importance of full compliance by BOCs with our rules requiring the separate provision of CPE, particularly with requirements for prompt disclosure of network interface information.[43] [44]

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[41] The RFP put out by Ameritech listed the following design concepts and guidelines for respondents:

1 OBJECTIVES

— To provide a family of Centrex terminal products which will serve a wide variety of customers in a cost effective manner. (Aesthetic continuity must span the entire product line. That is to say all products must look somewhat similar and must be clearly identifiable as Centrex systems components.)

— To provide a complementary line of terminal products to serve customers who, for logistical reasons, may not find Centrex service attractive.

— To provide a residential/small business station set which complements, draws attention to, and truly enhances the power of the Central Office. The set must be aesthetically designed to appeal to as broad a customer base as possible and must be competitively priced.

— To provide a fully featured residence communications system which can be sold profitably and enhances our image as a high tech company in the public's eye.

— To provide a line of ancillary equipment which renders the product line more flexible and allows it to appeal to a broader base of customers.

2) TECHNICAL REQUIREMENTS

A) BASIC OBJECTIVE - It is our intent to provide a *software intensive* line of customer premises equipment. That is to say future feature enhancements and configuration modifications should be achievable through software modifications rather than hardware additions/replacements. Ideally, these software modifications should be affected by Central Office downloading, and/or simple program insertions.

B) SPECIFIC TECHNICAL CRITERIA TO BE MET

(OMITTED)

[42] See n.43, above.

[43] Another set of issues concerning the extent to which BOCs may arrange to have Centrex service marketed in conjunction with compatible CPE has been addressed in another proceeding. American Information Technologies, BellSouth, and NYNEX, Interim Capitalization Plans for Furnishing of Customer Premises Equipment and Enhanced

56. Section 64.702(d)(2) requires a carrier owning basic transmission facilities to

> disclose to the public all information relating to network design and technical standards and information affecting changes to the telecommunications network which would affect either intercarrier interconnection or the manner in which customer premises equipment is attached to the interstate network prior to implementation and with reasonable advance notification. When such information is disclosed to the separate corporation it shall be disclosed and be available to any member of the public on the same terms and conditions.

See Reconsideration, 84 FCC 2d at 80. We have repeatedly made clear that this requirement is not to be construed narrowly.[45] We have stated that interconnection information encompasses all information necessary to build equipment or systems which can be interconnected with a carrier's network. Changes in the system which must be disclosed clearly include software changes, such as the introduction of new Centrex programming, which alter the capabilities of the network or the way in which CPE can interact with the network, as well as hardware changes.

57. In our *Disclosure Order* we observed that part of the rationale behind the inclusion in the *Computer II* rules of broad network information disclosure requirements was our recognition that "innovations in computer technology were rapidly bringing new types of CPE into the marketplace, and that future CPE might involve interaction with new or different network capabilities resident in carrier's basic transmission facilities." 93 FCC 2d at 1236 We therefore required AT&T to make public not only network information provided to its CPE subsidiary (then called American Bell Inc.) but also network information provided to AT&T's manufacturing and research affiliates for use in developing products to be marketed by American Bell. We further stated that "we would view it as a substantial violation of our disclosure rule if American Bell's CPE or enhanced service offerings were able to interact with AT&T's common carrier facilities in a unique or special way not generally made known or available to other vendors." 93 FCC 2d at 1238.

58. The BOCs, of course, do not have manufacturing affiliates. Nevertheless, BOCs may not selectively disclose network information, including software requirements for interface with Centrex features, to those manufacturers known to be suppliers of the subsidiary, or to

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Services, FCC No. 84-290 (released July 11, 1984) (Sales Agency Order). Several BOCs have submitted sales agency plans for our approval, and petitions for reconsideration are pending. *See* Public Notice, August 20, 1984.

[44] We note also that the MFJ may independently require such disclosure. See *United* States v. Am. Tel. & Tel. Co., 562 F Supp 131, 227, par. II. B. 2-4 (D.D.C. 1982).

[45] *See* Letter to Alfred A. Green, n.*3*, above; BPSS Tariff Order, 91 FCC 2d 1, at 18-19; Computer and Business Equipment Manufacturers Association, Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules, 93 FCC 2d 1226 (1983) (Disclosure Order).

manufacturers who might wish to use such information to create Centrex-CPE tailored for placement behind Centrex services.[46] In sum, network interface information provided by a BOC to its subsidiary or to any affiliated or non-affiliated research or manufacturing entity, must be made available to the public at the same time and under the same terms and conditions. Neither a BOC subsidiary nor an independent CPE vendor which is compensated by a BOC for sale of Centrex service should be able to offer CPE capable of interacting with the BOC's facilities based on interface specifications not made known or available to other vendors.

59. Accordingly, the Petition for Declaratory Ruling filed November 7, 1983 by the North American Telecommunications Association is GRANTED to the extent indicated above and is in all other respects DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

[46] The Ameritech RFP to which NATA has drawn our attention was publicized to the industry at large and included reference to several volumes of technical data which were being made publicly available.

Frequency Allocation
Frequency Allocation, Common Carrier
Frequency Allocation, Table of Frequency Allocations
Offshore Radio Telecommunication Service

Report and Order amends Parts 2, 22, 74 and 90 of the Rules to reallocated television Channels 15 and 16 in the Gulf of Mexico to Offshore Radio Service (ORS) and allows authorization of interstitial frequencies for ORS use in existing ORS allocation at television Channel 17.
—*Offshore Radio Service*
GEN. Docket No. 83-45

FCC 84-509

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Parts 2, 22, 74 and 90 of the Commission's Rules to provide additional Channels for the Offshore Radio Service.	Gen. Docket No. 83-45 RM-3910 RM-3924

REPORT AND ORDER

Adopted: October 26, 1984; Released: March 20, 1985

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

Introduction

1. This proceeding is in response to two petitions, RM-3910 and RM-3924, filed by the Offshore Telephone Company (OTC). In its first petition, RM-3910 filed June 10, 1981, OTC requested that the Commission amend its rules governing the Offshore Radio Service (ORS), previously the Offshore Radio Telecommunication Service,[1] to allow common carrier operators to use interstitial frequencies within the existing ORS allocation

[1] See Common Carrier Docket 80-57 adopted by the Commission on October 19, 1983, released on December 19, 1983 (FCC 83-476, 49 FED. REG. 3996, January 26, 1984).

at 488-494 MHz (UHF television Channel 17). Interstitial frequencies are channels offset in frequency by one half channel from the normal voice channels. In its second petition, RM-3924 filed June 15, 1981, OTC requested that the Commission amend its rules to reallocate UHF television Channels 15 and 16 in the Louisiana-Texas Gulf Coast Area for ORS use. In response to the petitions, the Commission adopted a Notice of Proposed Rule Making (Notice) combining the two petitions into the instant proceeding, General Docket No. 83-45.[2]

2. Comments in response to the Notice were filed by OTC, the Association of Maximum Service Telecasters, Inc. (AMST), the Central Committee on Telecommunications of the American Petroleum Institute (API), the County of Los Angeles (LA County) and the General Electric Company (GE). Reply comments were filed by AMST, API and OTC. Additional comments were filed by API on October 5, 1983 and a reply to API's additional comments was filed by AMST.

Background

3. In August of 1976, the Commission adopted a Report and Order in Docket 20368 establishing the ORS common carrier service.[3] ORS was designed to meet the growing radio communications needs of petrochemical companies operating in the Outer Continental Shelf region of the southern Louisiana Gulf Coast (Zone A).[4]

4. The rules adopted in Docket 20368 also amended the Table of Frequency Allocations, Section 2.106, of the FCC Rules by adding footnote NG114. This footnote reallocated UHF-TV Channel 17 frequencies (488-494 MHz) to the Domestic Public and Private Land Mobile Radio Services in the offshore Louisiana Gulf Coast areas.[5] Four megahertz of this spectrum was assigned for ORS use pursuant to Section 22.1001 of the Rules and the remaining two megahertz was assigned to the Private Land Mobile Radio Services for use pursuant to Part 90.315 of the FCC Rules.

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[2] The Notice of Proposed Rule Making in Gen. Docket No. 83-45 was adopted on January 27, 1983, and Released on February 22, 1983, by the Commission (FCC 83-35, 48 FED. REG. 11957, March 22, 1983).

[3] *Report and Order*, Docket No. 20368, 41 FED. REG. 33,883 (August 11, 1976).

[4] This service is authorized in the area, hereinafter Zone A, bounded by the coordinate lines 94°00′ West Longitude on the west, and 87° 45′ West Longitude on the east; by the three mile limit along the Gulf Coast on the north; and by the outer continental shelf on the south.

[5] NG114: In the offshore Louisiana Gulf Coast area, the band 488-494 MHz (TV Channel 17) is allocated to the Domestic Public and Industrial Radio Service in accordance with the regulation(s) set forth in Parts 22 and 90, respectively.

Notice

5. In the Notice, we proposed to reallocate UHF television Channels 15 and 16 in the Gulf of Mexico to meet the present and future ORS radio communications requirements. These requirements have significantly increased as new areas in the Gulf, which are outside the geographical boundaries of the current allocation, are being developed by petrochemical companies.[6] Based upon a study by our Office of Science and Technology, we proposed technical standards, including geographical boundaries for use of each of the Channels, to provide adequate protection from harmful interference to full service broadcasting and land mobile operations.[7] We solicited comments on the desirability of allocating some of the frequencies for private use, as is currently the case in the existing ORS allocation. We also asked for comments on whether there is a need to provide a protection standard to prevent intermodulation interference between land mobile stations operating on frequencies within television Channel 17 in the vicinity of Houston, Texas, and ORS stations operating on frequencies within television Channel 16.

Comments

ORS Spectrum Needs

6. AMST opposed the reallocation of television Channels 15 and 16 for ORS in the Gulf of Mexico. It claimed, as it had in its comments to the petitions, that there has been no demonstration of need to warrant increasing the spectrum allocated to ORS. It further argued that any additional ORS communication requirements should be met by alternative means such as satellite operations or by making better use of current allocations with advanced technologies such as trunking, cellular or amplitude compandored side band.

7. OTC, API, GE and LA County all supported the proposal to allocate additional spectrum for ORS use. OTC and API argued that the allocation is needed for two reasons. First, the current spectrum allocation, which is limited geographically to Zone A, is no longer able to meet the current ORS requirements within that Zone. Second, the allocation is needed to

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[6] Expansion of Channel 17 is not feasible due to cochannel land mobile operations in Houston.

[7] ORS operations on television channel 17, 488-494 MHz, will be restricted to current ORTS zone, Zone A, (see footnote 3). Operations on television channel 16, 482-488 MHz, will be restricted to Zone B which is bounded by the coordinates: Longitude 87° 45′ on the east to longitude 95° 00′ on the west and from the 3-mile limit along the Gulf of Mexico shoreline on the north to the limit of the Outer Continental Shelf on the south. Operations on UHF TV Channel 15, 476-482 MHz, will be restricted to Zone C which is bounded by the coordinates: longitude 94° 00′ on the east, the 3 mile limit on the north and west, a 175 mile radius from the reference point at Linares, N.L., Mexico on the southwest, Latitude 26° 00′ on the south, and the limits of the outer continental shelf on the southeast.

meet the radio communications requirements in the new areas in the Gulf of Mexico, which are outside the area covered by the current ORS allocation (Zone A), that are being explored by the petrochemical companies. These new areas for exploration were created by the Department of The Interior's new leasing program, which has vastly expanded the total area offered for lease to explore and develop petrochemicals in the Gulf of Mexico. In its comments, OTC also addressed the possibility of using satellite systems to meet the additional ORS requirements. It argued that satellite channels would be both expensive and spectrum inefficient. It claimed that off the shelf equipment for each terrestrial duplex single voice/data telephone circuit would cost $7,000 while a satellite channel would cost about $8,000 per month. It also noted that most satellite systems are designed for wideband communications while most ORS operations require only one or two channels per platform and, therefore, satellite systems would not be a very spectrum efficient way of meeting the ORS requirements. API also addressed the issue of using new technologies to meet future ORS requirements. It argued that it supports the use of new technologies and, in fact, is on the forefront of employing new technologies but that new technologies alone would not be enough to satisfy the offshore communications requirements.

Reallocation of Television Channels 15 and 16

8. OTC, API and GE supported the Notice's proposed reallocation of Channels 15 and 16. OTC argued that these Channels are unused, and never will be used, in the Gulf of Mexico for broadcasting and that this spectrum will simply be wasted if it is not reallocated for some purpose other than broadcasting. It also argued that these Channels may be used by ORS while providing full protection to full service broadcasting and land mobile operations. OTC further argued that these bands are desirable for ORS operations, as off the shelf equipment is available and the propagation characteristics of the frequencies in these Channels are very desirable for ORS operations. GE also supported this reallocation, claiming that it would be an efficient use of the spectrum. It supported its claim by noting that geographical sharing of the UHF television spectrum is tried and proven. Specifically, it noted the reallocation of television Channel 17 for ORS operations has resulted in greater use of the spectrum without causing any interference to broadcasting or land mobile operations.

9. AMST, however, opposed the reallocation of television Channels 15 and 16. It was particularly concerned about possible interference from ORS operations to a proposed broadcasting operation on Channel 15 at Laredo, Texas. It was also concerned that ORS operations may pre-empt possible low power operations on Channel 15 in four Texas cities,

Brownsville, Harlingen, Beaumont and Port Arthur. In response, both OTC and API argued that the proposed technical standards provide full protection to full service UHF TV broadcasting operations by requiring a 150 mile separation between the ORS station and a co-channel full service UHF broadcast station. OTC filed an engineering study with regard to protecting a proposed UHF Channel 15 broadcasting station at Laredo, Texas. It stated that only about 30 square miles, within 17 miles of the coast, of ORS Zone C would be affected. It noted that this was a very small portion of the ORS areas and did not consider this to be a significant loss to ORS, as very few ORS stations operate near the shore line. It did note, however, that if when UHF TV Channel 15 operation starts at Laredo, any ORS station in the affected area would be required to discontinue operations. API argued that with regard to low power broadcast use of Channel 15, the Commission should not be inhibited from providing for present communication requirements by providing protection from potential interference to potential stations. It argued that the Commission should adopt technical parameters to protect these stations only if and when they are authorized.

10. LA County, which supported a reallocation to ORS, requested that the reallocation be made in the spectrum above television Channel 20. It argued that this would eliminate all possible interference to possible future land mobile operations on television Channels 14 through 20 and would not set a precedent of using these frequencies for ORS in other parts of the country, such as southern California. It also requested that if an allocation is made to ORS on television Channels 15 and 16 as proposed, then the ORS service should be required to operate on a secondary basis to any future land mobile operations. In its reply comments, OTC responded to LA County's comments by arguing that LA County's comments add little to this proceeding as they are based on pure speculation, specifically that the Commission will reallocate these Channels for land mobile use.

Allocation for Private Use

11. In response to our solicitation regarding allocating a portion of Channels 15 and 16 for private use, extensive comments were filed by OTC and API. OTC was opposed to private use of the frequencies, claiming that a comprehensive common carrier system is necessary to serve such a vast area. It argued that private operators would have problems obtaining necessary relay rights-of-way from other offshore operators, that there are economies of scale in using a common carrier system (especially for sites located far from the mainland) and that a common carrier system would permit more efficient utilization of the spectrum. It also argued that private users could obtain frequencies

allocated to other private services by requesting waivers of the Commission's Rules, while common carriers could not. Further, in its reply comments OTC claimed that the private users had not demonstrated a need for an additional allocation. OTC went on to request that if an additional allocation were made for private use, it should be restricted to one or two megahertz. API, on the other hand, supported "spinning off" some of the spectrum for private use and requested that three megahertz per Channel be allocated for private use. It argued that users should be provided with an option of choosing between a private and a public system to meet their communication requirements in the expanded areas available for petrochemical development in the Gulf of Mexico. It claimed that common carrier facilities do not reach all areas of the Gulf. Further, it argued that private systems are particularly necessary when exploring new areas where common carrier service has not yet been initiated and where only limited requirements exist. It also claimed that when new areas are being explored, it is necessary to have secured communication facilities, which often may only be accomplished by private systems. It also argued that the existing allocation for private frequencies on Channel 17 has been extensively used and is of inestimable value to oil and gas industry licensees and that the new frequencies would be equally valuable.

Intermodulation Interference

12. In response to our solicitation regarding the likelihood of intermodulation interference between land mobile stations operating on frequencies within television Channel 17 and ORS operations on television Channel 16, we received comments from OTC. OTC noted that it is mathematically possible for intermodulation products to occur, but they are only likely to be harmful if the transmitters are located close to one another. However, it did propose that we adopt the same standards that were proposed in the Notice to avoid intermodulation interference between stations within an ORS zone. OTC proposed the following paragraph be added to Section 22.1001:

> Section 22.1001(e)(3) Where the proposed transmitting site is located west of longitude 93° 40'W, and is within 32.2 kM (20 miles) of the shoreline, and proposes use of the frequencies set forth in Section 22.1001(b), the applicant shall submit a showing that no third-order intermodulation interference would be caused to any base station or mobile operation using the frequencies between 488 and 494 MHz.

Interstitial Frequencies

13. Both OTC and API supported the proposal to permit interstitial channel assignments, which are channels offset by 12.5 kHz from the existing channels, in the current ORS allocation. There were no comments opposing this proposal. API, however, did request that the Commission

modify its proposal in order to allow interstitial frequency use within TV Channels 15 and 16 as well. OTC opposed this, arguing that interstitial usage in these new bands could reduce, rather than expand, spectrum use, as there would be a tendency to design primary channel operations around existing interstitial operations instead of the other way around. Therefore, it suggested that allowing interstitial assignments might better be considered after there is greater use of the primary channels.

Discussion

14. Our proposal in the Notice that additional spectrum is needed to meet current and future ORS communications requirements in the Gulf of Mexico, due to expanded areas of petrochemical development in the Gulf of Mexico and frequency congestion in the existing ORS band, was supported by OTC, API, LA County and GE. Further we believe, as stated in the Notice and supported by OTC and API, that UHF Television Channels 15 and 16 are appropriate choices for reallocation for the following reasons: A) these frequencies will remain unused in the Gulf of Mexico unless they are reallocated; B) there is equipment available at these frequencies that can provide reliable communications at a reasonable cost; C) ORS stations will be able to use these frequencies restricted by the geographical boundaries proposed in the Notice without causing interference to full service broadcasting stations or land mobile operations in the Gulf area; D) these frequencies will meet the ORS communications requirements as well as provide an alternative to other technologies, such as cellular and satellite operations,[8] which may be able to meet some, but not all of the offshore telecommunications requirements in the Gulf; and E) the reallocation will have only minimal impact on low power television operations. We believe that the protection standard for ORS based on our studies and proposed in the Notice, in particular the geographical boundaries placed on the use of each channel, will have little impact on low power broadcasting operations on Channels 15 and 16, as only a few sparsely populated areas will be affected. With regard to AMST concern regarding the four Texas cities, which it claimed would lose potential low-power television authorizations for Channel 15, our research into the matter revealed that no applications have been filed with the Commission for low power broadcasting authorization on Channel 15 in any of the four cities. Further, two of the cities, Brownsville and Harlingen, will be unable to use Channel 15 in any event due to cochannel full service broadcast operations in Mexico. Two other cities, Beaumont and Port Arthur, have a number of requests for low power operations on

[8] The Commission has accepted for filing applications for cellular systems in the Gulf (see File No. 29000-CL-P-83 adopted September 22, 1983, released October 7, 1983, FCC 83-434).

other Channels in their immediate areas. Therefore, we see little impact to the four cities cited by AMST just as we see little impact on the rest of the Coastal area from ORS operations on either Channel 15 or 16.

15. ORS operations must protect full service UHF TV stations. Full service UHF TV stations may modify their technical parameters and/or transmitter locations, in accordance with Part 73 of the Commission's Rules. If such modifications by the broadcast stations reduce the distance to any ORS or private land mobile stations in the Gulf to a separation less than those specified in Tables D and E of Section 22.1001(d) or Table 1 of Section 90.315(d) or the provisions of Section 90.315(g), then ORS and private land mobile stations will be required to adjust their operations to correspond to those rules. To smooth this process, we are requiring UHF TV licensees on Channels 14, 15, 16, 17 and 18 applying for a change in transmitter site that would result in a mileage separation less than that specified in the attached rules (i.e., 210 miles-cochannel, 80 miles-adjacent channel) to serve notice to those affected ORS and Private Land Mobile licensees using Channel 15, 16, and 17 frequencies at the same time the application for change is submitted to the Commission. We believe this is necessary because a change to a UHF TV station's transmitter site within the station's area of service is now considered a minor change by the Commission.[9]

16. We disagree with LA County's comments that the reallocation should be made above television Channel 20 to provide for possible future land mobile operations. We believe, as stated above and in the Notice, that Channels 15 and 16 provide the optimum allocation for ORS because they will be economically viable and will have minimal impact on existing and planned services. Further, we do not agree that ORS should now be made secondary to any future land mobile operation. Such a regulation should be considered for adoption only when and if a land mobile allocation is made so that all aspects of the issue may be considered.

17. We agree with API that there is a need to provide an allocation for private users in this new allocation, particularly since the new allocation covers additional area in the Gulf of Mexico, which is not covered by the current private allocation at Channel 17. However, it appears to us, from usage in the current allocation, that the allocation scheme of the current ORS frequencies, 4 MHz for common carrier use and 2 MHz for private use, would best meet the expanding communication requirements for both

[9] The Report and Order in MM Docket No. 83-1377, 49 FED. REG. 32586, August 15, 1984, redefined minor changes to UHF TV stations to include a change of transmitter site within a station's area of service. Minor changes do not require or receive a 30 day comment period after being placed on public notice before such changes may be approved. ORS licensees, of course, may file informal comments relating to such modification and the Commission has the discretion to consider those comments in determining whether to grant the change.

common carrier and private systems in the Gulf of Mexico. Therefore, we are modifying footnote NG114 of Section 2.106 of the Rules, from the text proposed in the Notice, to read as follows:

> NG114 In the Gulf of Mexico offshore from the Louisiana-Texas coast, the frequency band 476-494 MHz (TV channels 15, 16 and 17) is allocated to the Domestic Public and Private Land Mobile Radio Services in accordance with the regulations set forth in Parts 22 and 90 respectively.

We are also modifying Parts 22 and 90 as set forth in the Appendix, attached hereto, to reflect this allocation for private use. The technical standards adopted for Part 90 will be the same as those proposed for Part 22 in the Notice and adopted herein.

18. With regard to OTC comments on intermodulation interference between land-based mobile stations operating on Channel 17 frequencies and ORS operation on Channel 16 frequencies, we agree that the protection criteria proposed in the Notice to avoid interference between stations within an ORS zone would also provide adequate protection between land-based mobile and ORS stations. Therefore, we will adopt the suggestion of OTC and will require that certain Part 22 and 90 applicants for Channel 16 frequencies submit a showing that no third order intermodulation interference will be caused to existing base or mobile operations on Channel 17 frequencies.

19. With regard to authorization of interstitial frequencies, we agree with OTC that authorization of interstitial channels in the new ORS allocations, even though they would be secondary to the primary channel operations, could cause irregular growth in the primary channels. This could preclude use of some of the primary channels, thus reducing the spectrum efficiency of the new ORS allocation. Therefore, we will adopt usage of interstitial frequencies only in the existing ORS allocation at Channel 17, where there is already substantial usage of the primary channels. We are adopting use of interstitial frequencies for Part 22 as proposed in the Notice and also are adding rules to Part 90, as suggested by the commenters, that will allow interstitial frequency usage for private operations in the current allocation. We are applying the same geographical limitations for the Part 90 interstitial operations as we are applying for Part 22 interstitial operations.

Other Matters

20. In its comments, OTC suggested that we had inadvertently left out frequency pairs 489.325/492.325 MHz and 489.375/492.375 MHz from Section 22.1001(a) in Appendix B in the Notice. OTC also suggested that the frequency pairs 488.925/491.925 and 488.975/491.975 MHz should be deleted to preserve a guard band around the auto-alarm channel at 488.950/491.950 MHz. We have made the appropriate modifications to the frequency list in §22.1001(a) to include OTC corrections.

Administrative

21. Regulatory Flexibility Act Final Analysis

I. Need for and objective of final rules:

The objective is to reallocate the band 476-488 MHz (television Channels 15 and 16) for Offshore Radio Service use in the Gulf of Mexico and to allow use of interstitial frequencies in the current ORS allocation (television Channel 17, 488-496 MHz). This will satisfy the expanded communication requirements of petrochemical companies operating in the Gulf of Mexico.

II. Summary of issues raised by public comments:

There were no comments filed addressing the matters discussed in the initial regulatory flexibility analysis.

III. Alternative to the rule:

It does not appear that there are any significant alternatives to the adopted rules, other that those addressed and rejected in this ORDER, that would accomplish the stated objectives.

22. Accordingly, IT IS ORDERED, That pursuant to the authority found in Section 4(i), 301 and 303(r) of the Communications Act of 1934, as amended, (47 U.S.C. 154 (i), 301, 303(r)), Parts 2, 22, 74 and 90 of the Commission's Rules and Regulations IS AMENDED as specified in the Appendix. These amendments become EFFECTIVE April 26, 1985.

23. Further, IT IS ORDERED, That any UHF TV licensee using Channel 14, 15, 16, 17, or 18 filing an application to change transmitter site that would result in a mileage separation less than 210 miles (cochannel) or 80 miles (adjacent channel) from any ORS Zone as described in the attached rules (see Sec. 22.1001(a), (b) and (c)) shall serve notice to those ORS and Private Land Mobile licensees operating on Channels 15, 16, and 17 frequencies in the applicable zone. Names and addresses of affected ORS licensees may be obtained from the Commission's

Common Carrier Bureau and names and addresses of affected Private Land Mobile Radio Service licensees may be obtained from the Commission's Private Radio Bureau.

24. The Secretary shall cause a copy of this Report and Order to be served to all affected UHF TV licensees.

25. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Parts 2, 22, 74 and 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

A. Part 2 Frequency Allocations and Radio Treaty Matters; General Rules and Regulations

Section 2.106 is revised by modifying the text of footnote NG114 at the list of footnotes following the Table of Frequency Allocation.

§2.106 Table of Frequency Allocations

* * * * *

NG114 In the Gulf of Mexico offshore from the Louisiana-Texas coast, the frequency band 476-494 MHz (TV channels 15, 16 and 17) is allocated to the Domestic Public and Private Land Mobile Radio Services in accordance with the regulations set forth in Parts 22 and 90 respectively.

* * * * *

B. Part 22 Public Mobile Radio Services

Section 22.1001 is revised as follows:

22.1001 Frequencies

(a) On a shared basis with television broadcasting Channel 17, the following frequencies are for assignment to stations of communication common carriers in the Zone specified in Table A below together with the classes of station(s) to which they are normally assigned and the specific limitations which are enumerated in the explanatory notes:

Offshore central station frequencies (megaHertz)	*Offshore subscriber frequencies (megaHertz)*	*Limitations*
488.025	491.025	1
488.050	491.050	1
488.075	491.075	1
488.100	491.100	1
488.125	491.125	1
488.150	491.150	1
488.175	491.175	1
488.200	491.200	1
488.225	491.225	1
488.250	491.250	1
488.275	491.275	1
488.300	491.300	1
488.325	491.325	1
488.350	491.350	1
488.375	491.375	1

Offshore central station frequencies (megaHertz)	*Offshore subscriber frequencies (megaHertz)*	*Limitations*
488.400	491.400	1
488.425	491.425	1,2
488.450	491.450	1,2
488.475	491.475	1,2
488.500	491.500	1,2
488.525	491.525	1,2
488.550	491.550	1,2
488.575	491.575	1,2
488.600	491.600	1,2
488.625	491.625	1,2
488.650	491.650	1,2
488.675	491.675	1,2
488.700	491.700	1,2
488.725	491.725	4
488.750	491.750	4
488.775	491.775	4
488.800	491.800	4
488.825	491.825	3
488.850	491.850	3
488.875	491.875	3
488.900	491.900	3
488.950	491.950	5
489.000	492.000	6
489.025	492.025	6
489.050	492.050	6
489.075	492.075	6
489.100	492.100	6
489.125	492.125	6
489.150	492.150	6
489.175	492.175	6
489.200	492.200	6
489.225	492.225	6
489.250	492.250	6
489.275	492.275	6
489.300	492.300	6
489.325	492.325	6
489.350	492.350	6
489.375	492.375	6
489.400	492.400	2
489.425	492.425	2
489.450	492.450	2
489.475	492.475	2
489.500	492.500	2
489.525	492.525	2
489.550	492.550	2
489.575	492.575	2
489.600	492.600	2
489.625	492.625	2

Offshore central station frequencies (megaHertz)	*Offshore subscriber frequencies (megaHertz)*	*Limitations*
489.650	492.650	2
489.675	492.675	2
489.700	492.700	2
489.725	492.725	2
489.750	492.750	2
489.775	492.775	2
489.800	492.800	2
489.825	492.825	2
489.850	492.850	2
489.875	492.875	2
489.900	492.900	2
489.925	492.925	2
489.950	492.950	2
489.975	492.975	2
490.000	493.000	2

1 These frequencies will be assigned for voice grade general communications.

2 These frequencies may be assigned for private line service.

3 These frequencies are available for emergency communications involving protection of life and property.

4 These frequencies may be assigned to radio relay stations upon a satisfactory showing as to why it is impracticable to achieve the requisite communication without the use of radio relay stations operating on such frequencies.

5 These frequencies shall be used only for emergency auto alarm and voice transmission pertaining to emergency conditions.

6 These frequencies may be used for emergency shut-off remote control telemetry, environmental Data Acquisition and Dissemination, or facsimile transmissions.

TABLE A. – Frequency availability for Offshore Radio Service use.

Offshore	*Boundaries of zone*	*Frequencies (megaHertz)*
Southern Louisiana. (Zone A)	From long. 87°45′ on the east to long. 94°00′ on the west and from the 3-mile limit along the Gulf of Mexico shoreline on the north to the limit of the Outer Continental Shelf on the south.	Channel 17, 488-490 491-493.

(b) On a shared basis with television broadcasting Channel 16, the following frequencies are for assignment to stations of communication common carriers in the zone specified in Table B below together with the classes of station(s) to which they are normally assigned. These frequencies will be assigned for voice grade general communications and may be assigned for private line service.

Offshore central station frequencies (megaHertz)	*Offshore subscriber station frequencies (megaHertz)*	*Offshore central station frequencies (megaHertz)*	*Offshore subscriber station frequencies (megaHertz)*
485.025	482.025	486.025	483.025
485.050	482.050	486.050	483.050
485.075	482.075	486.075	483.075
485.100	482.100	486.100	483.100
485.125	482.125	486.125	483.125
485.150	482.150	486.150	483.150
485.175	482.175	486.175	483.175
485.200	482.200	486.200	483.200
485.225	482.225	486.225	483.225
485.250	482.250	486.250	483.250
485.275	482.275	486.275	483.275
485.300	482.300	486.300	483.300
485.325	482.325	486.325	483.325
485.350	482.350	486.350	483.350
485.375	482.375	486.375	486.375
485.400	482.400	486.400	483.400
485.425	482.425	486.425	483.425
485.450	482.450	486.450	483.450
485.475	482.475	486.475	483.475
485.500	482.500	486.500	483.500
485.525	482.525	486.525	483.525
485.550	482.550	486.550	483.550
485.575	482.575	486.575	483.575
485.600	482.600	486.600	483.600
485.625	482.625	486.625	483.625
485.650	482.650	486.650	483.650
485.675	482.675	486.675	483.675
485.700	482.700	486.700	483.700
485.725	482.725	486.725	483.725
485.750	482.750	486.750	483.750
485.775	482.775	486.775	483.775
485.800	482.800	486.800	483.800

Offshore central station frequencies (megaHertz)	*Offshore subscriber station frequencies (megaHertz)*	*Offshore central station frequencies (megaHertz)*	*Offshore subscriber station frequencies (megaHertz)*
485.825	482.825	486.825	483.825
485.850	482.850	486.850	483.850
485.875	482.875	486.875	483.875
485.900	482.900	486.900	483.900
485.925	482.925	486.925	483.925
485.950	482.950	486.950	483.950
485.975	482.975	486.975	483.975
486.000	483.000	477.050	480.050

TABLE B. – Frequency availability for Offshore Radio Service use

Offshore Zone	*Boundaries of Zone*	*Frequencies (megaHertz)*
Southern Louisiana – Texas (Zone B)	From longitude 87°45' on the east to longitude 95°00' on the west and from the 3-mile limit along the Gulf of Mexico shoreline on the north to the limit of the Outer Continental Shelf on the south.	Channel 16 482-484 485-487

(c) On a shared basis with TV broadcast Channel 15, the following frequencies are for assignment to stations of communication common carriers in the zone specified in Table C below together with the classes of station(s) to which they are normally assigned. These frequencies will be assigned for voice grade general communications and may be assigned for private line service.

Offshore central station frequencies (megaHertz)	*Offshore subscriber station frequencies (megaHertz)*	*Offshore central station frequencies (megaHertz)*	*Offshore subscriber station frequencies (megaHertz)*
476.025	479.025	477.075	480.075
476.050	479.050	477.100	480.100
476.075	479.075	477.125	480.125
476.100	479.100	477.150	480.150
476.125	479.125	477.175	480.175
476.150	479.150	477.200	480.200
476.175	479.175	477.225	480.225
476.200	479.200	477.250	480.250
476.225	479.225	477.275	480.275
476.250	479.250	477.300	480.300
476.275	479.275	477.325	480.325
476.300	479.300	477.350	480.350
476.325	479.325	477.375	480.375
476.350	479.350	477.400	480.400
476.375	479.375	477.425	480.425
476.400	479.400	477.450	480.450
476.425	479.425	477.475	480.475

Offshore central station frequencies (megaHertz)	*Offshore subscriber station frequencies (megaHertz)*	*Offshore central station frequencies (megaHertz)*	*Offshore subscriber station frequencies (megaHertz)*
476.450	479.450	477.500	480.500
476.475	479.475	477.525	480.525
476.500	479.500	477.550	480.550
476.525	479.525	477.575	480.575
476.550	479.550	477.600	480.600
476.575	479.575	477.625	480.625
476.600	479.600	477.650	480.650
476.625	479.625	477.675	480.675
476.650	479.650	477.700	480.700
476.675	479.675	477.725	480.725
476.700	479.700	477.750	480.750
476.725	479.725	477.775	480.775
476.750	479.750	477.800	480.800
476.775	479.775	477.825	480.825
476.800	479.800	477.850	480.850
476.825	479.825	477.875	480.875
476.850	479.850	477.900	480.900
476.875	479.875	477.925	480.925
476.900	479.900	477.950	480.950
476.950[1]	479.950[1]	477.975	480.975
477.000	480.000		
477.025	480.025		

Superscript (1) indicates frequencies shall be used only for emergency auto alarm and voice transmission pertaining to emergency conditions.

TABLE C. – Frequency availability for Offshore Radio Service use

Offshore Zone	*Boundaries of Zone*	*Frequencies (megaHertz)*
Southern Texas 15 (Zone C)	Longitude 94°00' on the east, the 3 mile limit on the north and west, a 175 mile radius from the reference point at Linares, N.L., Mexico on the southwest, Latitude 26°00' on the south, and the limits of the outer continental shelf on the southeast.	Channel 476-478 479-481

(d) All frequencies listed in this section are subject to the following conditions:

(1) No fixed or temporary-fixed stations shall be located and no mobile stations shall be operated outside the limits of the respective Zones specified in Tables A, B, and C.

(2) All classes of stations in the Offshore Radio Telecommunications Service shall afford protection to co-channel full service television

stations in accordance with the values set out in Table D below. In using Table D, the maximum permissible effective radiated power is determined as follows:

(A) Using the method specified in §73.611, determine the distance between the proposed station and the protected co-channel television station. If the exact mileage does not appear in Table D, the next lower mileage separation figure is to be used.

(B) Enter the table at the mileage figure found in (A) above. Opposite this mileage figure, ERPs are given that may be used for antenna heights of 100, 150 or 200 feet above sea level. If the exact antenna height is not shown, the ERP allowed will be that shown for the next higher antenna height.

(C) If the power found to be permitted following this procedure is lower than that determined hereafter from Table E, this lower figure is the maximum power that may be employed at the proposed station.

(3) All classes of stations in the Offshore Radio Telecommunications Service shall afford protection to adjacent channel full service television stations in accordance with the values set out in Table E below.

(4) No airborne subscriber station shall be operated with an effective radiated power in excess of 1 watt or at heights in excess of 1000 feet above mean sea level. Airborne subscriber stations using Channel 17 frequencies shall not be operated outside the limits of the Zone specified in Table A. Further, to provide adjacent channel protection to TV Channel 18, these stations shall not operate within an 128.8 km (80 mile) radial distance to Lake Charles, Louisiana. Airborne subscriber stations using Channel 16 frequencies shall not be operated outside the limits of the Zone specified in Table B. Further, to provide adjacent channel protection to TV Channel 15, these stations shall not operate within an 80 mile radial distance to Lafayette, Louisiana. Airborne subscriber stations using Channel 15 frequencies shall not be operated outside the limits of the Zone specified in Table C. Further, to provide adjacent channel protection to TV Channels 14 and 16, these stations shall not operate within an 80 mile radial distance of either Corpus Christi or Houston, Texas.

(5) Antenna heights in excess of 61 meters (200 feet) above mean sea level will not be authorized, except that surface mobile stations will be limited to a height of 30 feet above the waterline.

(6) Mobile stations shall not operate with an effective radiated power in excess of 25 watts within 32.2 km (20 miles) of the 3 mile limit. In all other Zones, the effective radiated power shall not exceed 100 watts.

(7) On its regularly assigned frequency, an offshore central station may be used to perform the added functions of a repeater station when means are provided whereby the licensee of the radio system is able to turn the station on and off at will irrespective of the transmissions of subscriber units on the mobile frequency associated therewith.

TABLE D. – Protection of co-channel full service television stations by stations in the Offshore Radio Service-maximum effective radiated power (watts).

[65dB protection]

Distance from ORTS Transmitter to TV station on the same channel	*Antenna height above sea level*		
	100 ft	*150 ft*	*200 ft*
Miles	Watts	Watts	Watts
210	1,000	1,000	1,000
205	1,000	900	800
200	800	710	630
195	590	520	450
190	450	400	330
185	320	280	240
180	250	210	175
175	175	150	130
170	180	110	100
165	95	80	70
160	65	55	50
155	50	40	35
150	35	30	25

Note: No ORS station shall operate less than 241.4 km (150 miles) from any full service co-channel TV station.

TABLE E. – Protection of adjacent full service channel television stations by stations in the Offshore Radio Service.

Distance beyond the 3-mile (4.8 km) limit.	*Antenna height above sea level*	
(miles)	*100 ft. (30.5 meters) (watts)*	*200 ft. (61 meters) (watts)*
4	25	6
5	40	10
6	65	15
7	100	25
8	100	35
9	215	50
10	295	70
11	400	100
12	530	130
13	685	170
14	870	215
15	1,000	270
16	1,000	415
17	1,000	505
18	1,000	610
19	1,000	730

Distance beyond the 3-mile (4.8 km) limit.	*Antenna height above sea level*	
(miles)	*100 ft. (30.5 meters) (watts)*	*200 ft. (61 meters) (watts)*
20	1,000	865
21	1,000	1,000

(e) A new ORS station may be permitted upon a showing of compliance with the following provisions:

(1) That the applicant has notified all licensees and permittees of ORS stations located within 321.8 km (200 miles) of the proposed station of the proposal giving them the following data at least thirty days before filing the application:

(i) The name, business address, frequency coordinator, and telephone number of the applicant.

(ii) The location by coordinate of the proposed station.

(iii) The frequency and type of emission proposed.

(iv) The height and type of antenna proposed.

(v) The bearing of the main lobe.

(vi) The effective radiated power proposed.

(2) That the proposed station protects the primary ORS channels by compliance with the following separations:

(i) Co-channel to a distance of 241.4km (150 miles).

(ii) When offset (interstitial) channels are used, adjacent channels (±12.5 kHz) to a distance of 80.5 km (50 miles).

(iii) Third order intermodulation channels plus or minus 12.5 kHz to a distance of 32.2 km (20 miles).

(3) Where the proposed transmitting site is located west of longitude 93°40′W, and is within 32.2 kM (20 miles) of the shoreline, and proposes use of the frequencies set forth in Section 22.1001(b), the applicant shall submit a showing that no third-order intermodulation interference would be caused to any base station or mobile operation using the frequencies between 488 and 494 MHz.

(f) Upon a showing of compliance with the following additional limitations an ORS station may be permitted using interstitial frequencies (12.5 kHz offset) in Zone A (Table A) using TV Channel 17 frequencies (488-490 and 491-493 MHz):

(1) That the station will be located east of 92 degrees West Longitude in the Southern Louisiana ORS zone (Zone A).

(2) That utilization of this channel is secondary to the utilization of any primary ORS channel set forth in paragraph (a) of this rule.

(3) That the station be utilized for voice grade general communications or to provide for private line service (see limitations 1 and 2 to the list of frequencies in paragraph (a) of this section).

C. Part 74 Experimental, Auxiliary, and Special Broadcast, and Other Program Distributional Services.

1. In Section 74.709, paragraph (e) is revised to read as follows:

§74.709 *Land mobile station protection.*

* * * * *

(e) To protect stations in the Offshore Radio Service, a low power TV or TV translator station construction permit application will not be accepted if it specifies operation on channels 15, 16, 17 or 18 in the following areas. West Longitude and North Latitude are abbreviated as W.L. and N.L. respectively.

(1) On Channel 15: west of 92° 00′ W.L.; east of 98° 30′ W.L; and south of a line extending due west from 30° 30′ N.L., 92° 00′ W.L. to 30° 30′ N.L., 96° 00′ W.L.; and then due southwest to 28° 00′ N.L., 98° 30′ W.L.

(2) On Channel 16: west of 86° 40′ W.L.; east of 96° 30′ W.L; and south of a line extending due west from 31° 00′ N.L., 86° 40′ W.L. to 31° 00′ N.L., 95° 00′ W.L. and then due southwest to 29° 30′ N.L., 96° 30′ W.L.

(3) On Channel 17: west of 86° 30′ W.L.; east of 96° 00′ W.L; and south of a line extending due west from 31° 30′ N.L., 86° 30′ W.L. to 31° 30′ N.L., 94° 00′ W.L. and then due southwest to 29° 30′ N.L., 96° 00′ W.L.

(4) On Channel 18: west of 87° 00′ W.L.; east of 95° 00′ W.L; and south of 31° 00′ N.L.

D. Part 90 Private Land Mobile Radio Services

Section 90.315 is replaced in its entirety by the following:

§90.315 Special provisions governing use of frequencies in the 476-494 MHz band (TV Channels 15, 16 and 17) in the Southern Louisiana - Texas Offshore Zone.

(a) The frequency bands from 490-491 and 493-494 MHz will be available for assignment to stations governed by this part within Zone A. The boundaries of Zone A are from longitude 87° 45′ on the east to longitude 94° 00′ on the west, and from the three mile limit along the Gulf of Mexico shoreline on the north to the limit of the Outer Continental Shelf on the south. The frequency bands from 484-485 and 487-488 MHz will be available for assignment to stations governed by this part within Zone B. The boundaries of Zone B are from longitude 87° 45′ on the east to longitude 95° 00′ on the west and from the 3-mile limit along the Gulf of Mexico shoreline on the north to the limit of the Outer Continental Shelf on the south. The frequency bands from 478-479 and 481-482 MHz will be available for assignment to stations governed by this part within Zone C. The boundaries of Zone C are from longitude 94° 00′ on the east, the 3 mile limit on the north and west, a 175 mile radius from the reference point at Linares, N.L., Mexico on the southwest, latitude 26° 00′ on the south, and the limits of the Outer Continental Shelf on the southeast. These frequencies may also be assigned to fixed stations located on shore designed to provide communications service within the zone.

(b) Offshore base/mobile, and offshore and shore fixed stations may be authorized.

(c) F2, F3, F4, F9, and A2, A3, A4, and A9 emissions may be authorized.

(d) Offshore stations shall afford cochannel protection to TV stations on Channels 15, 16 and 17. Station operating parameters shall be in accordance with the values given in Table 1.

Table 1. – Protection of Cochannel Television Stations by Offshore Stations operating in the Southern Louisiana-Texas Offshore Zone (65 dB Protection); Maximum Effective Radiated Power (in Watts)

	Antenna height above sea level (feet)		
	100	*150*	*200*
Distance from transmitter to cochannel TV station (in miles):			
210	1,000	1,000	1,000
205	1,000	900	800
200	800	710	630
195	590	520	450
190	450	400	330
185	320	280	240
180	250	210	175
175	175	150	130
170	130	110	100
165	95	80	70
160	65	55	50
155	50	40	35
150	35	30	25

Note: To determine the maximum permissible effective radiated power:

(1) As specified in Sec. 73.611 determine the distance between the proposed station and the cochannel television station. If the exact mileage does not appear in Table 1, the next lower mileage separation is to be used.

(2) Opposite this mileage figure ERPs are given that may be used for antenna heights of 100, 150, or 200 ft. ASL. If the exact antenna height is not shown, the ERP allowed will be that shown for the next higher antenna height.

(e) Shore stations communicating point-to-point with offshore stations will be permitted at least the same ERP as the offshore station, but only in the direction of the offshore station. A directional antenna shall be used and the rearward radiated power from the antenna in a sector 202 ½° from the line joining the shore antenna to the cochannel television station shall not exceed those shown in Table 2.

Table 2. – Maximum Rearward Effective Radiated Power Allowed for Shore Stations; Rearward Effective Radiated Power (in Watts) from Shore Antenna in a Sector ± 22 1/2° from the Line Joining the Shore Antenna to the Cochannel Television Station

	Antenna height above ground (feet)					
	100	*150*	*200*	*300*	*500*	*750*
Distance from transmitter to cochannel television station						
185	320	280	240	190	125	90
180	250	210	175	125	100	60
175	175	150	130	100	70	50
170	130	110	100	75	40	35
165	95	82	70	50	35	25
160	65	55	50	40	25	20
155	50	40	35	30	20	15
150	35	30	25	20	15	10
145	25	20	18	15	10	7
140	18	15	13	10	7	5
135	13	10	9	7	5	3
130	10	8	6	5	3	2
125	7	6	5	4	3	2
120	5	4	3	3	2	1

Note: As an example of the use of Tables 1 and 2, assume an offshore station located 180 mi from TV channel 17 located in Bude, Miss. with an antenna height of 100 ft. Table 1 allows this station to operate with 250 W ERP. Now assume the shore station communicating with the offshore station is 30 mi from the offshore station and 150 mi from Bude, Miss. The shore station antenna height is 500 ft. above ground. The shore station will be allowed the same ERP as the offshore station (250 W) in the direction of the offshore station. Table 2 indicates that the effective radiated power in a sector ±22 1/2° from the line joining the shore antenna to Bude, Miss. can only be 15 W. Consequently, a directional antenna must be used whose minimum front-to-back ratio over this 45° sector must be at least 12.2 dB. (250 W forward power to 15 W rearward power is a power ratio of 16.6 or 12.2 dB).

(f) To provide cochannel protection to television stations, no shore station will be allowed closer than 120 miles from the cochannel television station.

(g) To provide adjacent channel protection to television stations, no shore or offshore station shall be allowed within an 80 mile distance of the adjacent channel television station.

(h) Mobile stations shall not operate closer to shore than 4 miles beyond the three mile limit and shall not operate with an ERP in excess of 100 watts with 30 ft. maximum antenna height.

(i) Mobile stations installed in aircraft shall operate 7 miles beyond the three mile limit and shall not operate with an ERP in excess of 1 watt or at heights in excess of 1000 feet AMSL.

(j) The following frequencies are available for assignment in all services for use in the Zones as defined in paragraph (a) of this section.

	Paired Frequencies (MHz)	
Zone	*Transmit (or receive)*	*Receive (or transmit)*
A	490.025-490.975	493.025-493.975
B	484.025-484.975	487.025-487.975
C	478.025-478.975	481.025-481.975

Only the first and last assignable frequencies are shown. Frequencies shall be assigned in pairs with 3 MHz spacing between transmit and receive frequencies. Assignable frequency pairs shall occur in increments of 25 kHz.

(k) Fixed stations operating point-to-point shall be assigned frequencies beginning with 490.025/493.025 MHz (Zone A), 484.025/487.025 MHz (Zone B) and 478.025-481.025 MHz (Zone C) and progressing upwards utilizing available frequencies toward the end of the band. Offshore base/mobile stations shall be assigned frequencies beginning at 490.975/493.975 MHz (Zone A), 484.975/478.975 MHz (Zone B) and 478.975/481.975 MHz (Zone C) and progressing downwards utilizing available frequencies towards the beginning of the band. All frequency assignments are subject to the conditions specified in §91.173.

(l) Bandwidths other than 25 kHz may be authorized upon an adequate showing of need. An application requesting such authorization shall fully describe the modulation, emission and bandwidth desired, the bandwidth to be occupied, and justification for the request.

(m) Stations located east of 92°W longitude in the Southern Louisiana Offshore Zone may be authorized frequencies that are offset by 12.5 kHz from regularly assigned Zone A frequencies (490-491 and 493-494 MHz). Such assignments will be on a secondary, non-interference basis to primary authorized stations and shall be entitled to no protection from these stations.

(n) Where the proposed transmitting site is located west of longitude 93°40′W, and is within 32.2 k (20 miles) of the shoreline, and proposes use of the Zone B frequencies set forth in Section 90.315(j), the applicant shall submit a showing that no third-order intermodulation interference would be caused to any base station or mobile operation using the frequencies between 488 and 494 MHz.

* * * * *

CONCURRING STATEMENT OF COMMISSIONER JAMES H. QUELLO

In re: Report and Order in Docket 83-45, which amends Parts 2, 22, 74 and 90 to reallocate television channels 15 and 16 in the Gulf of Mexico to the Offshore Radio Service (ORS) and allows the authorization of interstitial frequencies for ORS use in the existing ORS allocation at television channel 17.

While it isn't clear that the use of UHF television channels 15 and 16 is required to provided service to the Gulf of Mexico, it seems likely that it is, at least marginally, the least expensive means of doing so. The Commission is properly aware of the immediate monetary costs of providing service but it should also be focusing upon the longer-term costs in terms of spectrum usage. While we have given lip service to more efficient spectrum usage for many years, we continue to try to solve virtually all spectrum shortage problems by taking spectrum from UHF television.

If new spectrum-efficient technologies are to develop in a timely fashion, the Commission must establish incentives for such development. Dipping into more and more UHF spectrum allocated to television will not solve our problems forever.

In this instance, UHF television spectrum provides a solution that does not appear to cause harm to present or future television service in the Gulf area. My concern is that the solution to this unique situation will generate enthusiasm for similar solutions to future problems which will be harmful to existing or potential UHF television service. I want to make it clear that I will resist any such efforts.

Therefore, I concur.

DISSENTING STATEMENT OF COMMISSIONER HENRY M. RIVERA

Re: Amendment of Parts 2, 22, 74 and 90 of the Commission's Rules to provide additional Channels for the Offshore Radio Service.

The majority's action is unacceptable. The majority makes an allocation that not only was never justified, but is no longer needed. The majority compounds its error by refusing to adopt routine efficiency standards to ensure that this spectrum is not squandered by the recipients.

Originally the Offshore Radio Service (ORS) was initiated to make ancillary use of UHF television spectrum in the Gulf of Mexico in *offshore* areas where use of the spectrum for television broadcasting was impossible.[1] Since the original allocation did not involve an "either-or" situation, the Commission did not make a public interest finding that ORS was preferable to UHF television in this band.[2]

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[1] "... the primary virtue of sharing TV Channel 17 is that the spectrum can be allocated for use in the Gulf by ORTS without preventing planned use of the same frequencies by another radio service." *Report and Order* in Docket No. 20368, 38 RR 2d 391, 394 (1976).

[2] "In summary then, we have reviewed all comments and investigated all issues raised in response to our NPRM/NOI, and have concluded that:

* * * * *

ORS licensees petitioned the Commission for additional channels to expand and increase capacity in the existing service area in 1981. In response, the Commission issued a notice of proposed rule making soliciting comment on the desirability of the proposed allocation. Broadcast interests and some private land mobile radio users objected. Although proceeding normally in its spectrum allocation process up to this point, the majority inexplicably diverges from its normal process by failing to survey use of the existing service's current spectrum. The *Report and Order* engages in a cursory effort to complete this step of the process, that is patently defective.[3] The next step, normally, would have been to determine if other parts of the spectrum have already been allocated to relieve the same problem.[4] Instead, the *Report and Order* fails to make findings on this critical element in the determination of whether allocation of additional spectrum is appropriate.

The majority's analysis is also flawed when it concludes that neither past nor future use of this spectrum by ORS will have any negative impact on full power television use of this spectrum. This conclusion is curious given that the Commission returned two applicants for Channel 16 in Florida because they conflicted with existing ORS allocation. This "no impact" conclusion is even more implausible when one recognizes that a Channel 16 television station could serve the city of New Orleans, but for the outcome of this proceeding. The majority ignores the consistent

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(d) Television Channel 17 can be shared without interference to established broadcast stations or adversely affecting the future growth of television service in the Gulf area."

Report and Order in Docket No. 203-68, 38 RR 2d 391, 396 (1976).

[3] The Commission does not keep loading records for common carrier services. So the staff could not provide an estimate of air-time figures measuring channel congestion. License records show that there are approximately 170 "mobile" stations on Channel 17 in the Gulf. To the extent that these are actually fixed or temporary fixed platforms that could operate on 12.5 MHz channels, this represents a loading of only one point-to-point link per duplex channel pairs. The small number of true mobiles do require 25 KHz channel pairs, but, since for ORS stations operate in a mobile mode, all the mobiles could be loaded on one channel. In light of this license data, it seems that the existing ORTS channels are very lightly loaded by any conventional measure.

[4] While satellite services were seen as too costly when ORT was initiated in 1976, the development of low cost spread spectrum satellite services today provides a viable option for platform data communications requirements. The Commission recently authorized cellular mobile telephone services in the Gulf that will provide private voice communications services not available in 1976. The Inland Waterways Communications System was recently authorized to expand its system into the Gulf. And 900 MHz mobile radio equipment, rejected as too new and costly to use for ORTS in 1976, now sells at prices comparable to 450 MHz equipment. Furthermore, since much of the expanded service area ORTS seeks to serve is far from the continental U.S., greater use of the Rural Radio Service and the 450 MHz industrial radio service may be possible without impact on-land use of these bands, as was the case in 1976.

growth and expansion of UHF television service into smaller and smaller cities. Previous commissions did not.[5]

While the majority's evaluation of full powered UHF television use of the subject channel is either misinformed or afflicted by extreme tunnel vision, the majority's evaluation of future low power television (LPTV) use of these channels is just plain disingenous. The majority examines the number of LPTV applications pending on these channels and concludes that the proposed reallocation will have no significant impact on LPTV.[6] It reaches this conclusion because only a few pending LPTV applications will be affected by the proposed reallocation and those applications appear defective and subject to return in any case. The majority, unfortunately, fails to take into account the fact that the Commission has had a freeze on the acceptance of LPTV applications in effect for the last three years.[7] Furthermore, even prior to that time, LPTV applications within the service area of any full powered television station were not acceptable for filing.[8] These restrictions had the effect of preventing most prospective LPTV applicants from filing from a date shortly after the service was created in 1980. Conveniently overlooking the fact that nobody is allowed to file, the Commission concludes from the absence of applications that there is no interest in LPTV in the effected coastal regions. Assuming, without factual support, that ORS needs this spectrum on the one hand, and that there would be little or no negative impact on broadcasting on the other hand, the majority concludes that a reallocation of this spectrum to ORS is in the public interest.

I cannot join in this caricature of the spectrum allocation process. However, I can recommend a few corrective actions that would position the Commission to undo some of the unnecessary damage. The Commission should monitor utilization of these channel by ORS and develop, for the first time, some data on channel loading and transmitters-per-channel. As the drilling process runs its course[9] and channel loading falls to sufficiently low levels, the Commission can mandate that platform

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[5] "In this specific case the Commission has concluded that sharing of UHF television Channel 17 is in the public interest. We are concerned, however, about the potential adverse impact of additional sharing in future development of UHF television service . . . in the foreseeable future any expansion of this service will be accommodated in frequencies other than those allocated to UHF television." *Report and Order* in Docket No. 20368, 38 RR 2d 391, 396 (1976).

[6] *Report and Order* at paragraph 14.

[7] *Order* at paragraph 46, FCC 83-423 (September 15, 1983); *Report and Order*, Docket No. 82-107, 47 Fed. Reg. 21468 (May 18, 1982).

[8] *Order Imposing Freeze*, 46 Fed. Reg. 2602 (May 11, 1981).

[9] The majority makes no mention of the fact that the current slump in crude oil prices had dramatically slowed to rate of exploration of new oil. As a result, the numerous new services added to the Gulf (see note 4, *infra*) may be competing with grossly underutilized systems for a rapidly dwindling number of new platforms.

operators utilize other services for their communications requirements and return this spectrum to television use. The Commission could make this corrective action self-effectuating by making ORS use of this spectrum primary for a five year only period and permit the filing of LPTV applications in this area after January 1, 1990. Furthermore, the Commission should adopt minimum loading levels, require trunking, mandate the use of 12.5 KHz channels for all fixed ("semi-permanent") transmitter sites and set a deadline for the introduction of more spectrum efficient technology, so that more efficient use of this spectrum can be made while it is allocated to the Offshore Radio Service.

Absent these corrective actions, future television use of this spectrum will be foreclosed only to reserve this spectrum for sparse use by ORS. This action will stand as a monument to inept spectrum management in the public disinterest. Accordingly, I dissent.

Control, Concentration of, Regional
Ownership of Stations, Limitations on

Commission eliminated regional concentration of control provisions of multiple ownership rules in recognition of significant growth in number of media outlets that has attenuated the need for restrictions. Under these changed circumstances, costs imposed by rule outweigh need for regulatory intervention.
—*Regional Concentration of Control*
MM Docket No. 84-19

FCC 84-156

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Repeal of the "Regional Concentration of Control" Provisions of the Commission's Multiple Ownership Rules	MM Docket No. 84-19 RM-4564

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 11, 1984; Released: May 1, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING.

Introduction

1. On January 12, 1984, we adopted a *Notice of Proposed Rule Making* in this proceeding, proposing either the elimination or substantial relaxation of the "regional concentration of control" provisions of Sections 73.35(b)(1), 73.240(a)(2), and 73.636(a)(2) of the Commission's Rules.[1] These sections[2] prohibit the common ownership, operation, or

[1] FCC 84-10, released January 17, 1984, 49 Fed. Reg. 2478, published January 20, 1984. The *Notice* established filing deadlines of February 21, 1984, and March 7, 1984, for comments and reply comments, respectively.

[2] Subsequent to the adoption of the *Notice* in this proceeding, the Commission issued its *Report and Order* in MM Docket No. 83-46 *et al.*, FCC 84- , adopted March 29, 1984, in which Sections 73.35, 73.240 and 73.636 were deleted and Section 73.3555 of the rules was added. Section 73.3555 consolidated the formerly separate multiple ownership provisions for each of the broadcast services without altering the substantive terms of those

control of three commercial AM, FM, or television stations where any two are located within 100 miles of the third, and where there is primary service contour overlap between any of the stations.[3] The rule also provides for two exceptions. First, any regional concentration of control issue which involves overlap of or by UHF television stations is examined on a case-by-case basis. Second, AM-FM combinations may be considered as one station if their communities of license are within 15 miles and/or within the same urbanized area.

2. The *Notice* was issued in response to a petition for rule making filed by the National Association of Broadcasters. Based upon our review of the comments and reply comments filed in this proceeding, as well as other relevant information noted herein, we conclude that the "regional concentration of control" provisions should be eliminated.

Background

3. Over the years, the Commission has taken two different approaches toward considering regional concentration of control issues. First, prior to the adoption of the current rule, the Commission resolved such issues on a case-by-case basis, under which it weighed various factors such as the size and population of the areas served, the distances between commonly owned stations, and the number of competing media. However, as explained in the *Notice* in this proceeding, such an *ad hoc* approach presented significant problems.[4] It proved to be burdensome to applicants who were required to conduct extensive media surveys to disprove the possibility that the grant of an application would result in undue concentration of control. It also created uncertainty among applicants who were unsure of the significance of each of the factors weighed by the Commission. *See, e.g., Clarksburg Publishing Company v. F.C.C.*, 225 F.2d 511 (D.C. Cir. 1955); *Wichita-Hutchinson Co.*, 17 R.R. 2d 1235 (1969); and *Forum Communications Co.*, 34 R.R. 2d 1163 (1975).

4. As a result, the Commission instituted, on its own motion, a rule making proceeding to establish a "fixed" standard for identifying and resolving regional concentration of control issues that would avoid the imprecision and unpredictability of the case-by-case approach. It ultimately adopted the current rule which relies on simple and easily understood, but extremely rigid, geographic and contour overlap criteria. However, as

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provisions. To provide continuity with our discussion in the *Notice*, we shall continue to refer herein to the rules by their former section designations.

[3] The term "primary service contour" refers to the predicted or measured 0.5 mV/m contour for AM stations, the predicted 1.0 mV/m contour for FM stations, and the predicted Grade B contour for TV stations, computed in accordance with Sections 73.183 or 73.186, 73.313 and 73.684, respectively, of the rules.

[4] *Notice of Proposed Rule Making* in MM Docket No. 84-19, 49 Fed. Reg. 2478, 2479, para. 4 (1984).

explained in the *Notice*, this "fixed" rule has presented serious problems of its own, producing inconsistent and arbitrary results in its application. Citing these difficulties and the substantial changes in marketplace conditions that have occurred since the policy bases for our regional concentration of control provisions were last examined, we requested comment on the problems associated with the present rule and on the advisability of substantially relaxing or eliminating entirely our regional ownership restraints.[5]

Comments

5. Comments filed in this proceeding recommended, almost unanimously, the elimination or significant modification of the regional concentration rules.[6] The comments reflected a strong consensus that the application of a "fixed" rule, without regard for geographic contours, population concentration, or competing services and marketplace conditions, has produced arbitrary and anomalous results.[7] NAB, recommending not only elimination of these rules but the underlying policy as well,[8] observed that the regional concentration issue is defined in terms which bear no relationship to the Commission's real concerns of competition and diversification in the broadcast industry. As a consequence, NAB alleged that rigid application of the rules has created an insurmountable burden in demonstrating that waiver of the rules would serve the public interest. Multimedia and ALF agreed that the impact of the regional concentration rules has not corresponded to the regulatory purposes they were intended to serve.[9] Noting that many contours extend beyond a station's genuine service area, ABC and MWK argued that the rules are very simplistic in

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[5] *Id.* at 2481-83, paras. 14-24.

[6] Formal comments in this proceeding were submitted by the following parties: American Broadcasting Companies, Inc. (ABC), American Legal Foundation (ALF), Bahakel Communications, Ltd. (Bahakel), Broadcast Licensees (MWK), Charisma Communications (Charisma), Communications Investment Corp. (CIC), Henry Geller and Donna Lampert (Geller), Multimedia, Inc. (Multimedia), National Association of Broadcasters (NAB), National Radio Broadcasters Association (NRBA), National Telecommunications and Information Administration (NTIA), North Carolina Association of Broadcasters (NCAB), Rand Corporation (Rand), United States Department of Justice (DOJ), United States Small Business Administration (SBA), Viacom International, Inc. (Viacom), and Western Pennsylvania Christian Broadcasting Company (WPCB).

[7] *See* comments of MWK, ABC, ALF, Bahakel, Charisma, Multimedia, NAB, NRBA, NTIA, NCAB, and Viacom.

[8] *See also* comments of CIC.

[9] ALF, for example, cited several cases in which application of the rules foreclosed otherwise meritorious applications for broadcast outlets or occurred where no possibility of regional concentration existed. *Piedmont Service Corp.*, 68 FCC 2d 992 (1978); *WFGL, Inc.*, 68 FCC 2d 892 (1978); and *Tri-State Broadcasting, Inc.*, 52 R.R. 2d 992, 1013 (1982).

considering only geographical distances and contour overlap.[10]

6. Beyond the arbitrariness of the current "fixed" rule, the most frequently cited argument supporting elimination of the regional ownership limitations was that expansion of the marketplace itself assures public access to a wide variety of diverse viewpoints and services. Because adequate protection for competition and diversity inheres in the market structure, many commenters urged, the Commission's initial concern with regional concentration has been rendered moot. CIC, for example, contended that diversity has already been achieved and that retaining the present limits adds only marginally to that diversity. Moreover, DOJ noted that elimination of the regional concentration rule would raise little risk of adverse competitive effects in broadcast markets because regional markets are not relevant to an analysis of competitive concerns. Similarly, NAB commented that diversity is simply not a meaningful concern in the regional market context, suggesting that "few people read daily newspapers or watch local TV broadcasts originating from different communities on a regular basis."

7. In addition, commenters insisted that the regional concentration rules have produced undesirable economic costs. Specifically, it was suggested that the rules may prevent regional broadcasters from establishing the widespread market presence necessary to compete effectively in the video marketplace. NRBA claimed that "only larger and financially stronger broadcast operations can produce the quality programming that increasingly sophisticated consumers demand in highly competitive markets." Moreover, Viacom, NAB and WPCB claimed that economies of scale are necessary to provide economically feasible service to many areas of the country. In addition, Bahakel observed that the rules may prohibit acquisition of stations which could improve program service in given markets. Thus, these commenters concluded that reduced efficiencies penalize broadcasters and consumers because they often result in reduced programming choices and service opportunities.

8. Two other arguments supporting the elimination of the regional concentration of control rules were made with some frequency. First, several commenters claimed that it was unfair to restrain ownership of only over-the-air commercial broadcast stations in this fashion.[11] Specifically, commenters noted that in expressly declining to adopt regional concentration rules for cable and LPTV, even the Commission has recognized that developments in the telecommunications marketplace have rendered such rules obsolete.[12] Secondly, many commenters[13]

[10] We also note that Rand submitted a study which found little or no evidence of anticompetitive behavior as a consequence of multiple station ownership.

[11] *See* comments of Charisma, Multimedia, NAB, Viacom and WPCB.

[12] *See* comments of Charisma, Multimedia, NAB and WPCB.

stressed that adequate regulation of legitimate regional concentration concerns could be accomplished through the enforcement of the "duopoly" and "one-to-a-market" rules and existing antitrust laws.[14]

9. One commenting party, Geller, argued that the Commission's proposal to eliminate the regional concentration rules disregards the Constitutional and statutory goals of diversification of sources in the marketplace of ideas in the area where diversity is most critical — the local/regional level. Geller observed that *any* numerical restriction must have an arbitrary component, but such a component is acceptable where, as here, it is necessary to effective regulation. Thus, Geller concluded that repeal of the rules would not only represent a serious departure from the Commission's historical concern with diversification of ownership but also be contrary to First Amendment principles. Geller also contended that by its recent action amending the Communications Act to allow the award of diversity preferences in lotteries, Congress has made it clear that the diversification principle cannot be abandoned *solely* on the basis of increased marketplace competition.

10. Several parties suggested that the anomalous consequences produced by the rules could be mitigated through substantial modification or relaxation.[15] ABC and ALF recommended amending the specific contour overlap which currently triggers application of the rules. However, NTIA and Rand insisted that an alternative structure was necessary to ensure First Amendment diversity and economic competition and suggested the use of a flexible guideline to determine whether the grant of a new license or the transfer of an existing license would serve the public interest. Rand suggested adoption of the guideline used by the Department of Justice in evaluating proposed mergers. NTIA agreed, and recommended issuing a *Further Notice* on the guideline issue.

Reply Comments[16]

11. With one exception, discussed below, the reply comments generally reiterated the support expressed in the comments for elimination of the regional concentration of control provisions. NAB again stressed its

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[13] *See* comments of Bahakel, NAB, NRBA, NCAB, DOJ and Viacom.

[14] Geller, however, concluded that the "one-to-a-market" and "duopoly" rules cannot effectively combat concentration arising out of multiple station ownership within a given geographic area.

[15] *See* comments of ALF, NTIA, and Rand.

[16] Reply comments were filed by: Department of Justice (DOJ); National Association of Broadcasters (NAB); North Carolina Association of Broadcasters (NCAB); and, Citizens Communications Center (Citizens) on behalf of itself and the National Conference of Black Lawyers, Communications Task Force, Black Citizens for a Fair Media, League of United Latin American Citizens, National Association for the Advancement of Colored People, National Association for Better Broadcasting and Telecommunications Research and Action Center.

contention that concentration of control, *per se*, as a potential antitrust violation, is properly within the province of DOJ's responsibilities. DOJ, however, qualified its role in this regard, asserting that deletion of the rule, which it favored, would not free the Commission of its obligation to review the possible anticompetitive effects of particular broadcast license transfers.[17] NCAB warned that a return to the case-by-case approach suggested by DOJ would only re-create the problems the "fixed" rule was designed to alleviate. They further noted that, in the past, case-by-case review had not produced a single instance of waiver under the rule.

12. Citizens alleged that the subject proceeding represents an attempt by the Commission to reverse its longstanding ownership policies without any evidentiary or analytical bases on which to ground such action. In its view, the Commission's suggestion that the current rule has produced arbitrary results does not warrant deleting the rule altogether since a more flexible approach to waivers could cure this deficiency. Moreover, Citizens argued that diligent enforcement of the rule has preserved diverse viewpoints on both regional and local levels and noted that the regional concentration of control provisions have not acted to bar group ownership but have simply restricted it within small geographic areas. Citizens also alleged that the *Notice* presented no evidence regarding ownership patterns and trends in regional markets. In this connection, Citizens submitted its own study, based on five selected Areas of Dominant Influence (ADIs). It contended that the study indicates a trend toward increased ownership concentration despite a concurrent increase in the number of commercial broadcast stations and called for further investigation of this pattern. Finally, Citizens stressed that reliance on antitrust laws and local market rules alone will not adequately protect against the dangers posed by potential ownership combinations. The regional rules, Citizens argued, are the only provisions which preclude partial contour overlap between different broadcast services in local markets and, as such, are a critical means of ensuring the diversity of viewpoints that the First Amendment seeks to serve.

Discussion

13. The Commission has traditionally sought to further the dual goals of program service diversity and economic competition in the broadcast media[18] by encouraging diversity in the ownership of broadcast facili-

[17] NAB contended that *United States v. F.C.C.*, 652 F.2d 72 (D.C. Cir. 1980), cited by DOJ, does not stand for the proposition that the Commission must consider competitive issues from an antitrust perspective.

[18] These goals, in turn, rest on the First Amendment concern for ensuring the broad availability of "information from diverse and antagonistic sources," *Associated Press v. U.S.*, 326 U.S. 1, 10 (1945), and the long-standing concern with undue economic concentration in the broadcast industry expressed by Congress in enacting the

ties.[19] To this end, we have adopted various rules limiting multiple ownership of broadcast entities on a local, regional and national level. In devising these restrictions, we have necessarily undertaken to balance the costs and burdens of regulatory intervention in the form of ownership constraints against the need for and benefits of such action in furthering our ultimate objectives. The points of balance we have struck in this regard, however, vary depending on the nature of the market concerned. Thus, in local market situations, we historically have found the need for regulatory assurance of diversity and competition more intense because the broadcast facilities at issue speak to the same audience and compete directly with one another. Accordingly, the "duopoly" and "one-to-a-market" rules are extremely strict, essentially requiring absolute ownership diversity. On a regional level, however, where the threat of adverse diversity and competition effects has been considered less immediate, a degree of multiple ownership has been permitted. Bearing this distinction in mind, our reweighing of the costs and benefits of regional ownership limitations leads us to the conclusion that these restrictions are no longer warranted.

Need for the Rule

14. *Marketplace Developments.* The dramatic growth in the number and variety of media outlets in recent years is perhaps the most critical development underlying our conclusion that regulatory restraint of regional ownership patterns is no longer appropriate. In this regard, we note that as of January 31, 1984, Commission records show that there were 10,161 authorized radio stations (4,899 AM and 5,262 FM) and 1,425 authorized television stations, representing increases of 19.5% and 38.5% in the number of radio and television stations, respectively, since the rule was adopted in 1977.[20] Moreover, as we pointed out in the *Notice*, these figures are likely to increase due to several rule making proceedings

Communications Act of 1934. *See Notice of Proposed Rule Making* in Gen. Docket No. 83-1009, 48 Fed. Reg. 49438, 49440 n.25, published October 25, 1983.

[19] *See, e.g., Report and Order* in Docket 8967, 18 FCC 288, 291-92 (1953); *First Report and Order* in Docket No. 18110, 22 FCC 2d 306, 307 (1970); and *First Report and Order* in Docket No. 20548, 63 FCC 2d 824, 827 (1977).

[20] By way of comparison, Commission records indicate that in 1977 there were 8,505 authorized radio stations (4,536 AM and 3,969 FM) and 1,029 television stations. *Notice of Proposed Rule Making* in MM Docket 84-19, 49 Fed. Reg. at 2480 (1983). It is perhaps more appropriate, however, to compare current operating station levels with those in 1953, the year in which the Commission first codified the factors utilized in its subsequent case-by-case reviews of regional concentration issues. *See Report and Order* in Docket No. 8967, 18 FCC 2d 296 (1953). This comparison reveals that, in the period 1953 to 1983, the number of operating AM, FM and TV stations increased by approximately 92%, 561% and 466%, respectively. *Notice of Proposed Rule Making* in Gen. Docket No. 83-1009, 48 Fed. Reg. 49438, 49443 (October 25, 1983).

which seek to make more broadcast frequencies available. For example, our action in Docket No. 20642 permitting the shared use of Class I-A clear channel frequencies, may ultimately result in the creation of more than 100 new AM stations.[21] Similarly, we recently implemented our *Report and Order* in BC Docket 80-90 and proposed 684 new FM channels.[22] We expect that this will generate a tremendous number of counterproposals by the public and that by the end of this year we might allocate as many as 1,000 new FM channels.[23] Furthermore, we have already authorized approximately 440 new low power television stations and have approximately 30,000 applications pending for new LPTV stations. Hundreds of these applications will likely be granted this year as a result of the monthly lotteries which have been conducted since September 1983.

15. Program service diversity and economic competition have also been enhanced by the significant expansion of new media delivery systems. As we explained in the *Notice*, the growth in the cable television industry has been very rapid and substantial, with 5,600 CATV systems serving about 25 million subscribers as of January 1, 1983.[24] More recent data reveals that there are currently about 30.3 million basic cable subscribers and that cable now passes about 64.2% of all television households in the United States.[25] In addition, there are about 16,500 applications pending for systems in the new multichannel multipoint distribution service which may in effect create "wireless" cable television systems with eight channels per market. The *Notice* also pointed out that further competition can be expected from numerous entities authorized to provide direct broadcast satellite service, with each operator capable of providing up to ten channels of programming to all television households in the United States.[26] Finally, there is additional service available from satellite master antenna systems, which currently have between 100,000 to 150,000 subscribers and from conventional MDS systems, which now

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[21] *Report and Order* in Docket No. 20642, 78 FCC 2d 1345 (1980), *recon. denied*, 48 RR 2d 1077 (1980), *aff'd sub nom. Loyola University v. F.C.C.*, 670 F.2d 1222 (D.C. Cir. 1982).

[22] *Report and Order* in MM Docket 84-231, 49 Fed. Reg. 11214, published March 26, 1984.

[23] *Id.* at para. 3.

[24] *Television Factbook*, 1982-83 edition, at 1560.

[25] *Cablevision*, February 27, 1984, at 86.

[26] Eight entities have already been authorized to provide DBS service. Seven additional applications were filed for DBS systems in January, 1984. Although DBS service is not scheduled to commence until 1986, at least one entity is currently providing "satellite-to-home" television programming to subscribers on the fixed satellite band in several areas of the country. *See GTE Satellite Corporation*, 90 FCC 2d 1009 (1982), *recon. denied*, FCC 83-271, released June 23, 1983. Additionally, one of the DBS licensees is planning to provide a similar service on the fixed satellite band until its own DBS satellites are launched. *See* Application File No. 170-DSS-MP/ML-84.

serve about 565,000 subscribers.[27]

16. *Impact of Marketplace Developments.* In our view, this substantial rise in the multiplicity of media voices considerably attenuates both the diversity and economic competition justifications underlying our regulatory limitation of multiple ownership on the regional level. First, by increasing the total base of stations, it dilutes the relative significance of group ownership as a potential threat to adequate program service diversity in any given region. As noted above, our broadcast ownership restrictions were adopted at a time when the total number of stations was substantially less than exists today and the likelihood was accordingly much greater that multiple ownership could confer considerable sway over public opinion. It was this very concern that primarily motivated adoption of our regional concentration of control provisions. In today's telecommunications marketplace, with its myriad voices, such an outcome appears to be highly unlikely.

17. Similarly, this growth in media outlets directly diminishes the likelihood that multiple ownership on a regional level might afford licensees sufficient economic power to permit anticompetitive behavior. As the number of alternative outlets rises, the capacity of any given level of group ownership to artificially restrict output and increase prices necessarily declines. Moreover, we agree with DOJ that market factors beyond the level of competing regional media suggest that elimination of the regional concentration of control provisions will raise little risk of adverse competitive effects in broadcast markets. This is because the rule does not address economic concentration of broadcast stations in any market relevant to antitrust concerns. Specifically, stations compete with each other for advertising at national and/or local levels. DOJ found that "... advertisers do not generally view the different local markets in a region as good substitutes for each other. Stations in one city do not compete with stations in another city, such that advertisers would respond to a price increase in one city by shifting to advertising in another city." Similarly, program acquisition by stations occurs primarily on a national or local basis, making the regional ownership rules unnecessary for ensuring competition in the program acquisition market. Thus, the only significant competitive issue raised by the regional rule is the degree to which it may incidentally prevent some acquisitions of broadcast stations that serve substantially the same area and that compete directly in local markets.[28] DOJ noted, however, that the Commission's "duopoly" and "one-to-a-market" rules address most possible problems of concentration

[27] *Notice of Proposed Rule Making* in Gen. Docket 83-1009, 48 Fed. Reg. at 49443 (1983).

[28] *See* DOJ comments, at 8. While DOJ does not exclude the theoretical possibility that regional concentration could enhance a multiple owner's power in a local market, it finds no evidence that this risk is significant.

in local markets, and concluded that any competitive protection that might be afforded by the regional ownership limitations appears to be minimal.

18. Citizens contended, however, that the increasing number of media voices has not allayed the concerns underpinning the regional concentration of control provisions. In this connection, it submitted a limited, five market study which purports to show a trend toward increasing regional concentration. After analyzing this submission, we are not persuaded that it accurately reflects regional market conditions in terms relevant to our analysis in this proceeding. Moreover, even if we were to accept the study at face value, we do not believe that it supports the conclusion that the regional ownership restrictions of our rules should be retained. First, assuming that Citizens' market analysis is correct, diversity — defined as the number of independent voices (each multiple owner counting once) — has generally not been harmed in the markets reviewed. Of the five markets examined by Citizens, the number of independent voices declined only in Twin Falls, Idaho, and then only by one voice in ten years. In all other markets, the number of independent voices remained the same or increased during the study period. This was so because, even though the number of multiple owners rose and the average number of stations held by each multiple owner also rose, the increase in the number of broadcast outlets compensated for this change.

19. Perhaps most damaging, however, is Citizens' failure to include in its concentration analysis significant additional media outlets available to the public in the studied markets. By omitting noncommercial broadcast stations, for example, Citizens ignores the significant contribution to diversity that these entities make in the markets where they are available. Indeed, in three (Detroit, Rochester and San Diego) of the five markets studied by Citizens, there are three or more operating noncommercial broadcast stations (data from Broadcasting/Cablecasting Yearbook, 1983). Similarly, Citizens' study does not account for nonbroadcast outlets and the role these facilities play in enhancing the diversity of viewpoints available to the public. Cable television, for example, is available in each of the markets evaluated by Citizens, with penetration rates approximating 50% in three of the five markets (data from *Television Markets and Rankings Guide*, 1982-1983). Further, all of the studied markets except Great Falls, Montana, are served by MDS (data as of December 31, 1983, from Paul Kagan, *Multicast*, March 4, 1983). When these other media outlets are included, as is appropriate for our analysis, we find that the level of diversity in the studied markets has increased over time, not decreased as suggested by Citizens.[29]

[29] We also note that Citizens' study utilized Arbitron's "Area of Dominant Influence" as a basis for defining the markets it reviewed. The Commission has previously found that this approach presents serious difficulties in the context of analyzing regional concentra-

20. *Effect of Other Multiple Ownership Limitations.* In reexamining the need for our regional concentration of control provisions, it is critically important to recognize that the Commission's other multiple ownership rules, particularly its local market restrictions, will continue to restrain group ownership, often more stringently, in many situations that would have been subject to the regional limitations. Moreover, this "overlap" of the local and regional rules most often occurs in "core market" areas, where our concern for diversity and economic competition is most intense.

21. Specifically, the "duopoly" rule prohibits the common ownership, operation, or control of two broadcast stations in the same service whose relevant contours overlap (*i.e.*, 1 mV/m contour for AM and FM stations, and Grade B contour for television stations).[30] Significantly, the "duopoly" rule is not limited in effect to a local area but also may prohibit the common ownership of two stations in excess of 100 miles apart depending upon the class of the station or size of its facilities.[31] In fact, because the "duopoly" contours may extend well beyond a station's community of license, they were originally objected to by the commenters in Docket No. 14711 as imposing "unrealistically wide separations between co-owned stations, the separations having little relation to the service actually rendered."[32] We further note that the "duopoly" contours are, with one exception,[33] the same as they are for the current "fixed" regional concentration rule, thus indicating some similarity in the scope of both rules. We believe that the often wide separations between commonly owned stations necessitated by these "duopoly" contours will continue to enhance diversity of voices and economic competition, and as a result, will act as an appropriate safety net in many instances.

22. Similarly, diversity and competition concerns in "cross-service" situations will remain the subject of the "one-to-a-market" rule which limits common ownership, operation, or control within a given market to one commercial AM-FM combination, or one commercial television station,

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tion of control issues. *See First Report and Order* in Docket No. 20548, 63 FCC 2d 824, 828 (1977).

[30] Sections 73.35(a), 73.240(a)(1), and 73.636(a)(1) of the Commission's Rules.

[31] For example, the predicted Grade B contour of a television station, utilizing maximum facilities, may extend 60 to 80 miles. *See* Sections 73.614 and 73.683 of the Commission's Rules. Similarly, a Class C FM station with maximum facilities has a predicted 1 mV/m contour extending approximately 57 miles. *See Report and Order* in BC Docket 80-90, 94 FCC 2d 152, 183 (1983). Finally, a non-directional AM station at maximum facilities, using median frequencies and conductivities, as well as a quarter-wave antenna, may have a 1 mV/m service contour extending about 85 miles. *See* Section 73.184 of the Commission's Rules, graph 12.

[32] *Report and Order* in Docket 14711, 45 FCC 1476, 1483 (1964).

[33] The exception is for AM stations. The "duopoly" rule uses the 1 mV/m contour for AM stations while the regional concentration rule uses the 0.5 mV/m contour.

or one daily newspaper.[34] In addition, our concerns with promoting diversity are served by the "diversification" criteria under which, in a comparative hearing between two or more applicants for a broadcast station, an advantage is given to the applicant with the least amount of other media interests.[35] Finally, we note that pursuant to the recently added Section 309(i)(3)(A) of the Communications Act, in those mass media services in which lotteries are used to select among competing applicants, a "significant" preference is granted to applicants that would increase diversification of ownership of the media of mass communications.[36]

Costs of Regional Ownership Limitations

23. Against the need for regional ownership restrictions as a means of ensuring diversity and economic competition, which we believe is strongly attenuated by the marketplace developments we have outlined above and by the continued applicability of our local market rules, we must balance the clear costs which these restraints involve. These include both administrative costs related to the substantial difficulties the Commission has encountered in devising a workable and administerable rule, and opportunity costs involving foregone service or economic efficiencies that might have contributed to our diversity and economic competition goals.

24. *Administrative Costs.* We explained at considerable length in the *Notice* the problems that have been presented by the current "fixed" rule in terms of its accuracy and consistency as a reliable indicator of concentration concerns.[37] We noted the severely anomalous results which it has precipitated and questioned, therefore, its continued viability. The commenting parties agreed nearly unanimously with our characterization of the "fixed" rule as an arbitrary and unworkable standard and nothing

[34] *See* n.30, *supra*. An exception is provided for UHF television stations, applications for which are handled on a case-by-case basis. *See, e.g., Television Corporation of Virginia*, 69 FCC 2d 1161 (1978); and *Jersey Cape Broadcasting Corporation*, 85 FCC 2d 654 (1981), *recon. denied*, 89 FCC 2d 984 (1982). However, requests for waiver of the "one-to-a-market" rule involving VHF television stations and aural facilities have been granted only in extremely limited situations. *See, e.g., Combined Communications Corporation*, 21 R.R. 2d 441 (1971); and *United Artists Group*, 44 R.R. 2d 1637 (1978).

[35] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-95 (1965).

[36] As previously mentioned, this lottery mechanism is currently being used to grant applications in the low power television service. In particular, applicants whose owners in the aggregate hold 50% or more of the ownership interest in no other media of mass communications receive a preference of 2:1. Applicants whose principals own 50% or more of the ownership in one, two, or three other media of mass communications obtain a preference of 1.5:1. Sections 1.622(i)(2) and (3) of the Commission's Rules. *See also Second Report and Order* in Gen. Docket 81-768, 48 Fed. Reg. 27182, published June 13, 1983.

[37] *Notice of Proposed Rule Making* in MM Docket No. 84-19, 49 Fed. Reg at 2481-82.

presented in the record herein persuades us to the contrary.[38]

25. The specific administrative costs produced by the arbitrary nature of the "fixed" rule are apparent from the filings of parties seeking waiver of its provisions. Such requests often focused on the failure of the "fixed" rule's simplistic "contour overlap" and "geographic proximity" criteria to consider such factors as the number of competing media outlets and the sizes or classes of stations involved. Thus, Commission resources were frequently devoted to analyzing detailed waiver requests in addition to the rule's explicit requirements. The only gain from this substantial administrative effort has been inconsistent and questionable case results. The rigid character of the "fixed" rule has also precipitated informal objections and petitions to deny in numerous cases where the rule did not technically apply, causing the Commission to substantively address the question of whether grant of a specific application would present regional concentration problems. *See, e.g., Millard V. Oakley*, 45 R.R. 2d 661 (1979); and *Acadian Television Corporation*, 51 R.R. 2d 743 (1982).

26. We also observed in the *Notice* that the *ad hoc* method of evaluating regional concentration issues, which the Commission utilized prior to adopting the "fixed" rule, had imposed substantial costs of its own.[39] For example, applicants often felt compelled to conduct extensive media surveys to convince the Commission that the public interest would be served by grant of their applications. The Commission's staff, in turn, expended a substantial amount of time in evaluating these studies, as well as subsequently filed amendments. The development of this media survey technique reflected the inherent unpredictability of the case-by-case approach and the generalized business uncertainty it produced for prospective broadcast applicants since, even though most applications were ultimately granted, parties were never sure of the significance attached to the various factors weighed by the Commission. Again, we can find no basis in the record to alter our initial view of this matter.[40]

27. *Opportunity Costs.* Our regional ownership rules also impose significant costs on the broadcast industry and, ultimately, on the public,

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[38] Noting that all rules are arbitrary to some extent, Geller and Citizens argued that the anomalous results produced by the current rule are primarily a result of the Commission's inflexible approach to waiver of the rule's rigid "minimum distance" and "contour overlap" criteria. A more liberal waiver policy, they contended, would cure these deficiencies while retaining a workable rule. The problem with this argument is that it effectively requires a return to the case-by-case approach to regional concentration issues, the very mechanism that the Commission rejected as too unpredictable and burdensome when it adopted the "fixed" standard.

[39] *Notice of Proposed Rule Making* in MM Docket No. 84-19, 49 Fed. Reg. at 2479.

[40] Citizens suggested various alternative rule formulations as a substitute for outright repeal of the regional concentration of control provisions. Citizens offered no explanation, however, as to how these approaches might improve upon the difficulties we have found inherent in such rules.

which conflict with the rule's underlying purposes of promoting economic competition and diversity of voices. For example, an owner of a broadcast station may be precluded from improving its facilities, thereby reaching a larger audience, because the rule would be violated. In some instances, this has prevented a first daytime or nighttime service which itself would have served directly our diversity and competition objectives. *Piedmont Service Corporation*, 68 FCC 2d 992 (1978).

28. Of equal importance, regional ownership restrictions preclude broadcasters from realizing the potential public interest benefits from the multiple ownership of stations on a regional basis.[41] In particular, joint ownership may create operating efficiencies, or economies of scale, that lower the multiple owner's production costs and thus permit it to channel saved resources into other areas such as programming. This may result in the acquisition of better quality programming that has not been previously available in a given market. Furthermore, a multiple owner may have improved access to capital, thus enabling it to upgrade an existing broadcast facility or activate an allocation that has been unused for a long period of time. *See, e.g., Windmill Broadcasting Co.*, 44 R.R. 2d 475 (1978); and *Meyer Broadcasting Co.*, 42 R.R. 2d 339 (1978). A multiple owner may also have greater research and development capabilities and thereby increase the potential for technological innovation in the industry.

29. Similarly, the larger audience and advertising bases available to a multiple owner may enable such an entity to produce or to acquire programming that each station, acting separately, could not. For example, joint ownership may facilitate the creation of a regional newsgathering and public information capability, which could enhance service to the public. The economies generated by multiple ownership may even be sufficient to facilitate the creation of new regional networks, with the resources to provide programming of special regional interest. This programming may be of an informational, sports, or entertainment nature. Furthermore, the development of regional networking may foster competition with the established national television networks, which could be beneficial to the public.

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[41] The comments submitted by S. Besen and L. Johnson, prepared for the Rand Corporation, evaluate empirical studies that attempt to determine the effect of multiple ownership in the broadcasting industry. While they state that the evidence is not definitive, these studies conclude that the economies to be derived from joint operation are not large. Besen and Johnson state, however, "... that in particular situations, substantial gains in economic efficiency might result if groups were permitted to expand beyond current limits.... [The weight of existing evidence] does not necessarily mean that in all cases group ownership confers few economic benefits." Comment at 32.

Conclusion

30. We believe that the significant expansion in both broadcast and non-broadcast media voices documented herein substantially alters the delicate balance of competing interests that underlies the current regional concentration of control provisions. In our view, this development, taken together with the effectiveness of our other multiple ownership rules in preventing adverse diversity and economic competition effects in regional markets, convinces us that the clear costs associated with our regional ownership limitations are no longer warranted. Accordingly, we shall delete these provisions in their entirety.

31. Pursuant to the requirements of Section 603 of the Regulatory Flexibility Act, 5 U.S.C. §603, a final regulatory flexibility analysis has been prepared and is attached hereto as Appendix B.

32. Accordingly, IT IS ORDERED That, Part 73 of the Commission's Rules and Regulations IS AMENDED, effective June 7, 1984, as set forth in Appendix A.

33. IT IS FURTHER ORDERED That, the petition for reconsideration or clarification of the Commission's *Memorandum Opinion and Order* in Docket No. 20548, 67 FCC 2d 54 (1977), filed by Great Trails Broadcasting Corporation, IS DISMISSED.[42]

34. IT IS FURTHER ORDERED That, this proceeding IS TERMINATED.

35. IT IS FURTHER ORDERED That, the Secretary SHALL CAUSE this *Report and Order* to be printed in the FCC Reports.

36. Authority for the actions taken herein is contained in Sections 4(i), 303(g) and (r) of the Communications Act of 1934, as amended.

37. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau (202) 63-7792.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

[42] Great Trails' petition, and responsive pleadings filed by Group One Broadcasting Co. and Lares Broadcasting Corp., raised questions concerning the AM-FM exception to the regional concentration of control provisions and the rights of stations "grandfathered" under these provisions to make changes in their facilities which would otherwise violate the rule. These pleadings were incorporated herein by the *Notice* in this proceeding, 49 Fed. Reg. 2479, 2480 (1984). In view of our action in this *Report and Order* eliminating the underlying regional concentration rule, Great Trails' petition and its associated pleadings are clearly moot.

Appendix A

47 C.F.R. §73.3555 is amended by removing paragraph (e) and redesignating paragraph (f) as paragraph (e) and paragraph (g) as paragraph (f); by removing Note 7 in its entirety; and by revising paragraph (d) to read as follows:

§73.3555 Multiple Ownership.

* * * * *

(d) No license for an AM, FM, or TV broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other broadcast station in the same service, if the grant of such license would result in a concentration of control of broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The FCC, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven AM, seven FM, or seven TV broadcast stations (no more than five of which may be in the VHF band).

* * * * *

Appendix B

Final Regulatory Flexibility Analysis

I. *Need for and Purpose of the Rule*

The purpose of the Commission's regional ownership constraints has been to promote diversity of program service and economic competition on a regional basis by encouraging diversity in the ownership of broadcast facilities. However, due to the dramatic increase in the number of broadcast and other media outlets that has occurred in recent years, and the further growth in this area that is reasonably anticipated in the near future, the Commission has determined that such constraints are no longer necessary or appropriate to accomplish these goals. Specifically, the increase in the number of media outlets has diluted the potential influence of any single broadcaster and has resulted in greater economic competition. Additionally, regulatory restraint of regional ownership patterns has imposed significant administrative costs. The existing rule has proven arbitrary and inconsistent in its application, while the former *ad hoc* approach was highly unpredictable, creating great uncertainty among applicants and significant burdens for the Commission. Further, regional ownership restrictions impose appreciable opportunity costs. Such provisions, for example, can prevent the activation of unused allocations or the improvement of existing facilities which would provide greater diversity and economic competition. These restrictions can also preclude broadcasters from taking advantage of the economies of scale or operating efficiencies accruing from group ownership of stations on a regional basis. These foregone savings could be channeled into the acquisition or production of better programming or even the development of new regional networks which would benefit the public by increasing viewing or listening options. Finally, it is important to note that the Commission's local market ownership limitations — such as the "duopoly" and "one-to-a-market rules" — substantially

overlap the regional concentration of control provisions and will continue to apply. Given these considerations, the benefits to be derived from continued regulation of regional ownership patterns no longer justify the costs associated with such provisions.

II. *Flexibility Issues Raised in the Comments*

The most significant regulatory flexibility issue raised in the comments was the impact that elimination of regional ownership restrictions would have on small entities that own and operate broadcast stations, particularly in small radio and television markets. In this regard, we do not believe that elimination of these provisions will result in adverse competitive effects on small entities. As the Department of Justice observed, regional ownership limitations do not operate in markets relevant to anticompetitive concerns. Specifically, stations compete for advertising revenue on local and national bases, which are not within the scope of the subject provisions. Consequently, elimination of these restraints will not affect competition within these local and national advertising markets. Similarly, the program acquisition market operates on local and national levels, making regional rules unnecessary to ensure competition in the purchasing of programming. Moreover, other Commission rules and policies will still be in place — including the "duopoly" and "one-to-a-market" rules — to ensure that in the relevant *local* markets, anticompetitive group ownership patterns potentially harmful to small broadcast entities do not develop. Finally, we note the elimination of the regional concentration of control provisions was supported by small broadcasters, as well as larger ones, who believe the rules are unnecessary and too costly.

III. *Significant Alternatives Considered But Not Adopted*

Two significant alternatives were considered. The first was to relax the rule by using smaller "contours" for measuring overlap. The second was to replace the rule with flexible guidelines as a basis for reviewing the proposed acquisition of broadcast stations. These alternatives were both rejected because no persuasive demonstration was made of a need for continued regulatory intervention that would justify the costs which these provisions would impose. Such costs include both the opportunity and administrative costs discussed above. With regard to administrative costs in particular, the first alternative does not appear appreciably different from the existing rule and would seem just as likely to produce arbitrary and inconsistent results, while the second alternative would again return us to a case-by-case approach, with its inherent uncertainty and substantial administrative burdens.

Equipment, Industrial, Scientific, and Medical
Frequency Management
Police Radio Service, Use of
Rules, Amendment of

First Report and Order adopted for spread spectrum systems operating in Police Radio Service and in ISM bands have been kept deliberately conservative in order to minimize any possibility of interference from these systems to existing services. The remaining issues which were discussed in the *Further Notice*, 49 FR 21951, in this docket have been deferred.
—*Spread Spectrum Systems*
GEN. Docket No. 81-413

FCC 85-245

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Authorization of spread spectrum and other wideband emissions not presently provided for in the FCC Rules and Regulations.	Gen Docket No. 81-413

FIRST REPORT AND ORDER

Adopted: May 9, 1985; Released: May 24, 1985

BY THE COMMISSION:

Introduction and Summary

1. Spread spectrum modulation is a wideband modulation which was originally developed for military applications but which has several interesting civil applications[1]. This technology has been implicitly forbidden by the FCC rules with a few limited exceptions. On June 30, 1981, the

[1] The spreading or dilution of the energy in spread spectrum systems over a wide bandwidth results in several possible advantages: short range overlays on other emissions, resistance to interference from other emissions, and low detectability. While it is not anticipated that spread spectrum will replace other types of modulations in general, the unique characteristics of spread spectrum offer important options for the communications system designer.

Commission adopted a *Notice of Inquiry* ("*Inquiry*")[2] in this proceeding seeking comments on a rule structure that would permit civil use of this technology[3].

2. Based on the comments received in the *Inquiry*, we adopted a *Further Notice of Inquiry* and *Notice of Proposed Rulemaking* ("*Further Notice*"),[4] on May 26, 1984, proposing specific rules for spread spectrum in Parts 15 and 90 of our Rules. In this First Report and Order we are adopting some of the proposals of the *Further Notice* with some modification. The remaining issues in the *Further Notice* raised significant controversy in the Comments and we are continuing to review these to see what action is appropriate.

3. In general, the replies to the *Inquiry* favored the Commission's effort to introduce this communications technique. However, many of the respondents were concerned that implementation of this technique might cause unacceptable interference to existing services unless its development was restricted to low-powered, limited range applications and that the allowable frequencies and powers were carefully chosen. Because the technology is new and unfamiliar to the civilian sector, many urged the Commission to proceed slowly with its implementation until sufficient experience in the identification and measurement of spread spectrum signals had been gained and an assessment had been made of their interference potential. Without this information, the majority of the respondents were firmly against a general overlay of spread spectrum systems upon existing services. However, few objected to the use of these systems in an overlay fashion, as long as they were restricted to low-power and limited range applications.

4. From the responses to the *Inquiry* the FCC developed rulemaking proposals for the operation of spread spectrum systems as licensed devices in the Police Radio Service under Part 90 of the Rules and as low-powered, limited range devices to be authorized under Part 15 of the Rules. As a further incentive for the development of this technology, the rules would allow spread spectrum systems of higher power to operate in the 902-928, 2400-2483.5 and 5725-5875 MHz Industrial, Scientific and Medical ISM bands. However, the record was still not sufficiently complete to allow a drafting of the equipment authorization procedures and measurement standards that would be used to determine the equipment compliance for these systems. Accordingly, the *Further Notice* was released by the Commission on May 21, 1984 to solicit further

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[2] 87 FCC 2d 876.

[3] A companion Notice of Proposed Rulemaking was adopted in Docket 81-414 proposing use of spread spectrum in the Amateur Radio Service and has been implemented, in part, in a Report and Order we are adopting today.

[4] 49 Fed. Reg. 21951, 98 FCC 2d 380, FCC 84-169, Docket 81-413.

information on the equipment authorization and measurement procedures and to obtain comments on the proposed rules.

Discussion of Comments and Reply Comments

5. Thirty seven comments and fifteen reply comments were filed in response to the *Further Notice*. These came from a wide range of parties and interest groups. A list of those filing comments is contained in Appendix A.[5,6] Along with comments from individuals, comments were received from amateur radio, broadcasting, business and industry, cordless telephone manufacturing, police and public safety, and radiopositioning and radionavigation interest groups. Most of the comments which were received were directed to issues or questions posed in the *Further Notice* and no significant new matters relative to the proceeding were raised.

6. Many of the respondents favored the proposed authorization of spread spectrum for low-power limited range communications devices and considered the proposed rules conservative enough for immediate adoption. Others, including broadcasting interests in particular, expressed concern over interference to their services from these devices. Though not opposing the Commission's action in general, they did oppose the overlay of spread spectrum systems on the frequency bands in which they are operating.

7. More specifically, broadcasting groups and some large consumer product manufacturers (RCA, GE and others) suggested that the present level of television service would be seriously degraded if spread spectrum systems were allowed to operate in the television bands. Even though the proposed rules were formulated to offer to this service a level of protection from direct sequence systems equivalent to a TASO 3 level of reception at the Grade A service contour, it was argued that an interference level based on this criterion would produce a degradation of

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[5] Some of the comments which were received were not pertinent to this proceeding. ONI, Racal-Decca Survey, Inc., Sercel Inc. and Teledyne Hastings-Raydist all filed comments which were concerned solely with radiolocation operations in the 1600-3000 kHz band. These comments are outside the scope of this proceeding which is concerned with spread spectrum systems operating on frequencies above 70 MHz. The comments of these parties will be considered under Docket 84-874 which is dealing with radiolocation allocations in the 1900-2000 kHz band.

[6] Exxon's comments which described a downward looking impulse radar system being developed under a Special Temporary Authorization from the Private Radio Bureau, were also outside the scope of this proceeding. Although the Exxon system operates on frequencies between 100 and 1000 MHz, its relatively high output power (33 watts) and antenna height (to be operated from a hovering aircraft) may require a special allocation under Part 2 of the Rules rather than any consideration in this proceeding under Part 15. We have not received sufficient information in this proceeding in the type of system Exxon proposes to formulate a specific proposal.

picture quality for those living outside of this contour. It was also argued that interference from these systems would cause a loss of picture quality in those areas, both within and outside the Grade A service contour, where reception is superior to TASO 3 at the present time.

8. COMSAT, STC and AT&T were concerned that some microwave, cellular and satellite facilities may be especially vulnerable to interference from spread spectrum devices particularly in those services where wide bandwidths are employed and weak signals are involved.

9. ARRL and several individual amateurs were concerned about possible interference from spread spectrum systems operating in the amateur bands at 144-146, 220-225 and 420-450 MHz. They argued that since amateurs operate in residential environments, which could conceivably contain many Part 15 spread spectrum devices, their systems would be more susceptible to interference from these devices than those in other services which are operating principally in nonresidential environments. It was further argued that in many amateur operations the level of the ambient noise is critical since they are often dealing with very weak signals which in many cases are barely on the fringes of detection. These signals can be easily masked and lost in interference coming from other sources.

10. Of the parties submitting comments that opposed the proposed authorization of spread spectrum systems, RCA was the only one that supported its position with analysis. RCA's analysis dealt with possible interference to FM and television broadcasting from spread spectrum systems operating in the broadcast bands. However this is not a consideration in this item which is concerned with the authorization of spread spectrum systems in the ISM bands and on Public Safety Radio frequencies.

11. Several police and public safety groups filed comments on the proposed authorization of spread spectrum systems in the Police Radio Service bands under Part 90 of the Rules. The major concern of all of these parties was not interference to their service from the police use of spread spectrum systems in these bands, but rather from other spread spectrum systems that would be authorized to use these bands on a secondary basis. The only major difficulty that was foreseen with the police use of spread spectrum systems in these bands was a possible increase in band congestion. To ease this congestion, as well as to provide a broader range of frequencies that could be used for covert operations, it was suggested that the proposed Part 90 spread spectrum authorization be extended to all frequencies in the Public Safety Radio Services.

12. Both APCO and the County of Orange, California, thought that there was no need to increase the present power limit of 2 watts for fast frequency hopping systems operating in the Public Safety bands and that

the proposed 15 watt limit for these systems should be reduced to 2 watts. They stated that a 2 watt limit should be sufficient for all of their present and future frequency hopping needs and can easily be increased later if necessary. They also requested that the station identification requirement of Section 90.19(g)(3) of the present Rules should be eliminated for undercover operations, since it not only jeopardizes the security of these operations but it also creates a real danger to the agents involved.

> We have long noted that this is an ambiguous rule, providing use "without special authorization", while at the same time requiring "station identification". This inconsistency has led to some problems which would no doubt be perpetuated and possibly increased by the rules as proposed. We would suggest some special type of provision which would allow the frequency coordinator to recommend or assign these channels on a secondary basis, but without the necessity for a formal license, which defeats the intent of maintaining security through anonymity.[7]

County of Orange also requested the use of other Public Safety frequencies for surveillance operations using modulations other than spread spectrum only if approval of the coordinator had been obtained.

13. No serious objections were raised to the authorization of spread spectrum systems in the 902-928, 2400-2483.5 and 5725-5875 MHz ISM bands as long as these operations did not cause interference to systems that have been authorized the use of these bands under other Parts of the Rules. Both NTIA and GE thought that there should be a cap on the maximum output power which these systems can use. NTIA suggested a power limit of 10 watts, GE a limit of 7 watts. COMSAT expressed concern that use of 5850-5875 MHz might cause interference to the new Fixed Satellite Service allocation in that band.

14. In the *Further Notice,* we asked if the proposed rules would be sufficient to allow the development of wireless data terminal systems or whether more power should be allowed for these devices, either by the creation of a special business-industrial class permission under Part 15 or by authorizing them in one of the licensed services. Hewlett-Packard, which has been developing these systems on an experimental basis under Part 5 of the Rules suggested that the power limits proposed in the *Further Notice* are not sufficient for these devices. Based upon the field strengths which they consider to be adequate for the development of these devices, the proposed level for direct sequence emissions of 33 uV/m at 3 meters per 4 MHz of bandwidth is at least 10 times too small. If this power limit cannot be raised for these systems, then Hewlett-Packard suggested that wireless data terminals be licensed in the Private Land Mobile Radio Services as a separate service under Part 90 of the Rules. RCA felt that since these terminals would be mainly business and not consumer devices, they should be licensed under Part 94 of the Rules for

[7] APCO Comments, page 5.

the Private Operational-Fixed Microwave Service, rather than under Part 15.

15. Comments were also solicited in the *Further Notice* concerning the feasibility of authorizing carrier current spread spectrum systems. Hewlett-Packard has already made measurements on an experimental 5 milliwatt system and finds that the technology is very promising. Hewlett-Packard can foresee little interference to other authorized services from these systems as long as the carrier current operations are confined to large buildings or areas within buildings which have their power supplied from transformers rather than by a direct connection to the AC power lines. These power transformers with their large interwinding capacitances would prevent much of the RF energy generated by the spread spectrum systems from being fed back into the AC power lines. Carrier current systems are limited to operation on frequencies below 20 MHz because of the excessive signal losses that occur when operated on frequencies above this. We find the two Hewlett-Packard suggestions to be promising new applications of this technology and will consider in the near future further action to authorize their use.

16. A request was made in the *Further Notice* for assistance in developing measurement procedures for spread spectrum systems. Although many parties addressed this matter, there was little consensus as to what these procedures should be. However, most parties did agree that a measurement bandwidth must be specified before any meaningful measurement procedures could be drawn up.

17. Some cordless telephone manufacturers expressed concern in the comments that the proposed spread spectrum authorizations could prejudice their petition for 2 MHz of spectrum in the 900 MHz band.[8] They felt that the present action by the Commission might force them to utilize a technology which they do not have the resources at the present time to develop, and which may not provide sufficient power for their needs.

18. Of the bands presented above, only two were addressed in a degree which allows for a well reasoned decision. We are deferring without prejudice action on all other issues addressed in the *Further Notice*. The two issues to be decided at this time are the use of spread spectrum in the Police Radio Service and the use of spread spectrum in the ISM bands.

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[8] See Electronic Industries Association *Petition for Rulemaking*, RM 4780; (requesting an allocation of 2 MHz of spectrum for cordless telephone use in the 900 MHz band) (filed March 1, 1984.)

Findings

Spread Spectrum in the Police Radio Service

19. The record of this proceeding is sufficiently complete at the present time to enable us to authorize frequency hopping systems to be operated on a limited basis on certain frequencies in the Public Safety Radio Service. This would expand the provisions currently given in Section 90.19(g)(3). This authorization is limited to law enforcement officers and its purpose is to allow them to set up communication links on these frequencies that can be used in connection with physical surveillance, stakeouts, raids and other such activities. Operation on these frequencies will be on a noninterference basis to the operations of other licensees who have been authorized the use of these frequencies under other sections of the Part 90 Rules. In addition, their use of these frequencies is subject to the approval of the applicable frequency coordinators of the Public Safety Radio Service of the district in which the license and equipment are to be used and if non-police Public Safety frequencies are to be used the coordination of the other service's coordinator is also needed. The changes to Part 90 of the Rules and Regulations to accomplish this authorization are presented in Appendix B.

20. Since spread spectrum transmissions are not readily detectable by criminals who may be monitoring the air waves and since they are difficult to jam, this authorization gives law enforcement officers an extremely valuable tool to use in their operations. Federal law enforcement agencies operating radio systems under 47 USC 305 are already authorized by the National Telecommunications and Information Administration to use spread spectrum in their operations on a case by case basis. These new rules extend this same capability to state and local law enforcement agencies as well.

21. Under the new Part 90 Rules frequency hopping systems with a maximum output power of 2 watts are allowed to operate on any of the frequencies presently available to the Public Safety Services as listed in Subpart B of Part 90 of the Rules. The 2 watt power limit for these systems is the same as that which is permitted for all present users of these frequencies, on a "without prior FCC approval" basis, irrespective of the modulation which they may be using. Hence, frequency hopping systems which are operating on these frequencies are not expected to cause harmful interference to other users of this spectrum. The 2 watt output power limit applies to all frequency hopping systems that are operating on these frequencies no matter what their hop rate is. Requests to use higher powers will be considered on a case-by-case basis for special temporary authorizations. Appendix C gives guidelines for coordinators to use in considering requests to use frequency hopping systems which we feel should be adequate to prevent harmful interference.

22. While the Commission and some law enforcement agencies have experience with frequency hopping systems, at this time there is very little non-military experience with direct sequence systems. We have traditionally been extremely careful in minimizing the likelihood of harmful interference to critical public safety systems. Thus we shall defer at the moment the permanent authorization of direct sequence systems for police use until we have more data available. We plan to conduct tests at our Laboratory and will invite representatives of the police community to participate. Pending further action in this area, experimental and developmental licenses and special temporary authorization will be available to manufacturers and police licensees who wish to try direct sequence systems.

23. Both APCO and the County of Orange, California have brought to our attention the inherent danger that the station identification requirement of Section 90.19(g)(3) of the present rules poses to both the security of undercover operations and the safety of the agents involved. Since the frequencies allocated for these operations can only be used by the law enforcement officers for spread spectrum, and, since approval must be obtained from the applicable frequency coordinators prior to the use of these frequencies for police spread spectrum operations, it would seem that any unauthorized use of these frequencies can be readily detected. Thus, we feel that the station identification requirement present in this section of the Rules is superfluous and can be deleted safely.

Spread Spectrum in the ISM Bands

24. Spread spectrum systems are also being authorized under Part 15 for general usage in the 902-928 MHz, 2400-2483.5 MHz and 5725-5850 MHz ISM bands. Due to COMSAT's concern in its comments about the possibility for interference to the Fixed Satellite Service allocated at 5850-5875 MHz, we have excluded these frequencies from spread spectrum usage. These systems may operate within these bands with a maximum output power of 1 watt. RF output power outside these bands over any 100 kHz bandwidth must be 20 dB below that in any 100 kHz bandwidth within the band which contains the highest level of the desired power. For certification of spread spectrum equipment that is to be used in these bands, the applicant applying for certification must demonstrate by either measurement of analysis that this limit has been met. Spread spectrum systems are allowed to operate within the ISM bands only on a noninterference basis to other operations that have been authorized the use of these bands under other Parts of the Rules. They must not cause any harmful interference to these operations and must accept any

interference which these systems may cause to their own operations.[9]

25. Although both NTIA and GE found no great difficulty with spread spectrum systems operating within the ISM bands with maximum output powers of 7 watts, GE did take exception to the opening of these bands to communications systems which have been accustomed to operation with some degree of protection from interference. GE fears that the steady encroachment on these bands by other services will eventually lead to petitions from these other users for protection from interference from ISM devices. This would be unfortunate since industry is constantly finding new uses of these frequencies in many diverse applications ranging from coal desulphurization to food sterilization.

26. We appreciate GE's concern in this regard and acknowledge the danger in opening these bands to high power communications devices. In addition, Part 15 of the Rules is intended to provide authorization for low power communications devices and not for communications devices of considerable output power. To open the Part 15 rules to high-powered communications devices, even in a band where other authorized high powered industrial and government equipment is already operating, would not be in keeping with the purpose of this Part of the Rules. Therefore we have reduced considerably the original power limits that we proposed for systems operating in these bands, even below the levels proposed by NTIA and GE. Even at that, the limit of 1 watt that we are allowing for these systems is still much higher than the level of power that we would normally authorize for devices. However, both because of the unique nature of these bands and because the systems being authorized under these rules will be spreading this energy over a wide bandwidth, we believe an output power level of 1 watt is justified. In view of the 1 watt power limit which we are adopting in the final rules we believe the possibility of these systems interfering with other authorized users of these bands is small.

Conclusion

27. The rules which are adopted here for spread spectrum systems operating in the Police Radio Service and in the ISM bands have been kept deliberately conservative in order to minimize any possibility of interfer-

[9] NTIA has recently studied the current and potential electromagnetic usage of these three bands. Their findings are contained in the following reports.

See Bohdan Bulawka, "Spectrum Resource Assessment in the 902-928 MHz Band", NTIA Report 80-46, September 1980;

See Robert T. Watson, "Spectrum Resource Assessment in the 2300-2450 MHz Band", NTIA Report 81-78, September 1981;

See William B. Grant, John C. Carroll and Charles J. Chilton, "Spectrum Resource Assessment in the 5650-5925 MHz Band", NTIA Report 83-115, January 1983

ence from these systems to existing services. As a further safeguard, all spread spectrum devices which will be permitted under the Part 15 rules proposed in this Report and Order are required to be certified as a prerequisite to marketing. The Rules for the certification of Part 15 low power communication devices are given in the Rules and Regulations under Part 15, Subpart B. See also Part 2, Subpart J, for general certification and type acceptance procedures. In addition, the Commission has the discretionary authority to call in sample devices for testing as part of the certification process. As we have done in the past with cordless telephones, CB radios, home computers and other devices, we expect to engage in a thorough sampling program until we are confident that the manufacturers have gained sufficient knowledge and skill in building these devices, so that they pose no potential interference problems to other uses of the radio spectrum. The procedures for the type acceptance of equipment to be used in the Police Radio Service are given in Section 90.203 of the Rules and in Subpart J of Part 2.

28. With the above mentioned safeguards that have been built into the Rules, we do not feel that requiring spread spectrum transmitters to use automatic identifiers is warranted at the present time. However in the future, when a much broader authorization of spread spectrum systems may be considered, we may wish to consider some form of transmission identifier to assist us in identifying and locating units which may be causing interference.

29. We are deferring without prejudice action on the remaining issues which were discussed in the *Further Notice*, such as, the operation of low powered spread spectrum devices on frequencies above 70 MHz, the measurement procedures to be used in the certification of these devices and the possibility of licensing spread spectrum wireless data terminals and carrier current systems under other Parts of the Rules. For further information about this Report and Order contact, Dr. Joseph Mc Nulty at (301) 725-1585 or Dr. Michael Marcus at (202) 632-7040.

Regulatory Flexibility Final Analysis

30. *Reason for Action.* The Commission believes that its rules and policies should be reviewed in the context of current social, technological and financial environments in which licensees and applicants operate, so that service to the public may be facilitated while at least regulatory cost is imposed. It is in this light that it is considering modification of its Part 15 and Part 90 rules.

31. *The Objectives.* The Commission proposes to accommodate spread spectrum systems by reducing regulation to the maximum extent feasible. The Commission believes that such action will lead to a more rapid development of spread spectrum technology in the civilian sector.

32. *Legal basis.* Action proposed herein is taken pursuant to Sections 4(i), 7(a), 302 and 303(r) of the Communications Act of 1934, as amended.

33. *Description, potential impact and number of small entities affected.* The ability to develop communications equipment which employs spread spectrum modulation techniques as described in the attached Rules will be beneficial to all entities which are involved. Therefore, we foresee only positive impacts on small entities.

34. *Recording, record keeping and other compliance requirements.* The modifications to Part 15 and 90 of the Rules would require record generation by the manufacturer sufficient to meet the usual equipment authorization requirements. Additionally, the modifications of the Part 90 Rules require a simple onetime notification to the applicable frequency coordinators of the district in which the license and equipment are to be used.

35. *Federal rules which overlap, duplicate or conflict with this rule.* None.

36. *Any significant alternatives minimizing impact on small entities and consistent with the stated objective.* None.

37. Accordingly, IT IS ORDERED, that effective June 15, 1985, Part 15 and Part 90 of the Rules and Regulations ARE AMENDED as set forth in the attached Appendix B. The authority for this action is found in Sections 4(i), 7(a), 302, and 303(r) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX B

CHANGES TO PARTS 2, 15 AND 90 OF THE FCC RULES AND REGULATIONS

A. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 2.1, General Definitions, is amended by inserting the following definitions in alphabetical order.

Spread Spectrum Systems. A spread spectrum system is an information bearing communications system in which: (1) information is conveyed by modulation of a carrier by some conventional means, (2) the bandwidth is deliberately widened by means of a spreading function over that which would be needed to transmit the information alone. (In some spread spectrum systems, a portion of the information being conveyed by the system may be contained in the spreading function.)

Direct Sequence Systems. A direct sequence system is a spread spectrum system in which the incoming information is usually digitized, if it is not already in a binary format, and modulo 2 added to a higher speed code sequence. The combined information and code are then

used to modulate a RF carrier. Since the high speed code sequence dominates the modulating function, it is the direct cause of the wide spreading of the transmitted signal.

Frequency Hopping Systems. A frequency hopping system is a spread spectrum system in which the carrier is modulated with the coded information in a conventional manner causing a conventional spreading of the RF energy about the carrier frequency. However, the frequency of the carrier is not fixed but changes at fixed intervals under the direction of a pseudorandom coded sequence. The wide RF bandwidth needed by such a system is not required by a spreading of the RF energy about the carrier but rather to accommodate the range of frequencies to which the carrier frequency can hop.

Time Hopping Systems. A time hopping system is a spread spectrum system in which the period and duty cycle of a pulsed RF carrier are varied in a pseudorandom manner under the control of a coded sequence. Time hopping is often used effectively with frequency hopping to form a hybrid time-division, multiple-access (TDMA) spread spectrum system.

Pulsed FM Systems. A pulsed FM system is a spread spectrum system in which a RF carrier is modulated with a fixed period and fixed duty cycle sequence. At the beginning of each transmitted pulse, the carrier frequency is frequency modulated causing an additional spreading of the carrier. The pattern of the frequency modulation will depend upon the spreading function which is chosen. In some systems the spreading function is a linear FM chirp sweep, sweeping either up or down in frequency.

Hybrid Spread Spectrum Systems. Hybrid spread spectrum systems are those which use combinations of two or more types of direct sequence, frequency hopping, time hopping and pulsed FM modulation in order to achieve their wide occupied bandwidths.

B. Part 15 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. New Section 15.126 is added to read as follows:

Section 15.126 Operation of spread spectrum systems

Spread spectrum systems may be operated in the 902-928 MHz, 2400-2483.5 MHz and 5725-5850 MHz frequency bands subject to the following conditions:

(a) They may transmit within these bands with a maximum peak output power of 1 watt.

(b) RF output power outside these bands over any 100 kHz bandwidth must be 20 dB below that in any 100 kHz bandwidth within the band which contains the highest level of the desired power. The range of frequency measurements shall extend from the lowest frequency generated in the device (or 100 MHz which ever is lower) up to a frequency which is 5 times the center frequency of the band in which the device is operating.

(c) They will be operated on a noninterference basis to any other operations which are authorized the use of these bands under other Parts of the Rules. They must not cause harmful interference to these operations and must accept any interference which these systems may cause to their own operations.

Note: Spread spectrum systems using the 902-928 MHz, 2400-2500 MHz and 5725-5850 MHz bands should be cautioned that they are sharing these bands on a noninterference basis with systems supporting critical government requirements that have been allocated the usage of these bands on a primary basis. Many of these systems are airborne radiolocation systems that emit a high EIRP which can

cause harmful interference to other users. For further information about these systems, write to:

Director
Office of Plans and Policy
U.S. Department of Commerce
National Telecommunications and
Information Administration
Room 4096
Washington, D.C. 20230

Also, future investigations of the effect of spread spectrum interference to Government operations in the 902-928 MHz band may require a future decrease in the power limits.

(d) For frequency hopping systems, at least 75 hopping frequencies, separated by at least 25 kHz, shall be used, and the average time of occupancy on any frequency shall not be greater than four-tenths of one second within a 30 second period. The maximum bandwidth of the hopping channel is 25 kHz. For direct sequence systems, the 6 dB bandwidth must be at least 500 kHz.

(e) If the device is to be operated from public utility lines, the potential of the RF signal fed back into the power lines shall not exceed 250 microvolts at any frequency between 450 kHz and 30 MHz.

C. Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. Section 90.19 (g)(3), Police Radio Service, is amended as follows:

(3) A licensee may use, without special authorization from the Commission, any mobile service frequency between 40 and 952 MHz, listed in Subpart B of this Part of the Rules, for communications in connection with physical surveillance, stakeouts, raids, and other such activities. Such use shall be on a secondary basis to operations of licensees regularly authorized on the assigned frequencies. The maximum output power that may be used for such communications is 2 watts. Transmitters, operating under this provision of the Rules, shall be exempted from the station identification requirements, of Section 90.425. Use of Public Safety frequencies not listed in paragraph (d) of this section is conditional on the approval of the coordinator corresponding to each frequency. Spread spectrum transmitters may be operated on Public Safety frequencies between 37 and 952 MHz, providing that they are type accepted by the Commission under the provisions of Sections 2.803 and 90.203 of the Rules, and meet the following conditions:

(i) frequency hopping transmitters can be operated, with a maximum output power of 2 watts, on any Public Safety mobile service frequency between 37 and 952 MHz listed in Subpart B of this section. At least 20 hopping frequencies shall be used and the average time of occupancy on any frequency shall not be greater than 1/10 second in every 2 seconds;

(ii) use of spread spectrum transmitters under this section of the Rules is subject to approval by the applicable frequency coordinator of the

radio services of the district in which the license and equipment are to be used.

2. Section 90.207, Types of emissions, is amended as follows:

(k) For stations in the Fire, Police and Power Radio Services utilizing digital voice modulation, in either the scrambled or unscrambled mode, F3Y emission will be authorized. Authorization to use F3Y emission is construed to include the use of F9Y emission subject to the provisions of Section 90.233.

3. Section 90.209, Bandwidth limitations, is amended by inserting new paragraph (h) as follows:

(h) All out of band emissions, including spurious emissions from switching, that are produced by frequency hopping systems, shall be kept below the limits specified in this Section of the Rules for similar systems which are modulated about a fixed frequency and do not frequency hop.

APPENDIX C

INITIAL COORDINATOR GUIDELINES FOR SPREAD SPECTRUM

Spread spectrum can be an important tool for law enforcement use in applications where it is vital that radio transmissions must not be detected. While conventional voice privacy systems protect the contents of a message, the presence of encrypted communications is readily detectable and in itself could jeopardize the security of a sensitive operation.

These guidelines are intended to help coordinators in approving requests to use spread spectrum. Requests that do not comply with these guidelines may not be interference-prone, but would require either more detailed calculations or a field test to determine the likelihood of interference. Coordinators may also wish to consider approving uses that have a small interference potential if they feel the value of the operation supported exceeds the cost of the interference.

A frequency hopping (FH) system which hops at a rate of over 100 hops/sec and which hits a conventional voice channel less than 5% of the time will not cause harmful interference regardless of field strength. The interaction of FH with traditional systems becomes more noticeable as the hopping rate is decreased. Hopping rates of less than 10 hops/sec are not recommended for this reason. Frequency hopping systems may trigger carrier operated repeaters on frequencies that they use. (Such repeaters are rare in the public safety services and the Commission has consistently discouraged their use because of their susceptibility to false triggering.) Thus, special steps are needed to protect such repeaters. Interaction with conventional receivers will be further minimized if the hopping frequencies are interleaved between conventional channels.

The following conditions should be met for coordination without a field test:

1. All FH systems should hop at more than 10 hops/sec. As hopping rates greater than 100 hops/sec are preferred, coordinators may wish to have a field demonstration of slower systems.

2. The coordinator should ensure that the sum of the inverse of the processing gain (that is, the number of frequencies used) of all FH systems operated in a given band within a 70 mile diameter does not exceed .05.

All frequencies used by carrier operated repeaters within 50 miles should be excluded from the set of hopping frequencies unless it can be demonstrated that the turn-on delay of the repeater is adequate to prevent false triggering (50 - 100 ms is probably needed).

All frequencies used by digital data systems and paging systems within 50 miles should be excluded from the set of hopping frequencies unless a field test can show absence of harmful interference.

Control, Transfer of

Voting in an entirely new Board of Directors of a corporate licensee in a proxy contest is a transfer of control cognizable under Section 310 of the Act. Modified short-form procedures found appropriate in this case.

—*Storer Communications, Inc.*

FCC 85-200

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of	
The Committee for Full Value of Storer Communications, Inc.	File No. BTCCT-850319KK-KQ
For Consent to Transfer of Control	

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 1985; Released: April 22, 1985

BY THE COMMISSION: CHAIRMAN FOWLER, AND COMMISSIONERS QUELLO, DAWSON AND RIVERA CONCURRING AND DISSENTING IN PART AND ISSUING STATEMENTS.

Background

1. On March 29, 1985, the staff granted the applications set out in the caption to permit the Committee for Full Value of Storer Communications, Inc. (the Committee), to engage in a proxy contest in which it seeks to replace the existing Board of Directors of Storer Communications, Inc. (Storer). We now consider: Storer's application for review of that action filed April 1, 1985[1]; joint comments in support of the application for review filed April 2, 1985, by the Media Access Project, the Telecommunications Research and Action Center, and Action for Childrens Television (collectively referred to below as MAP); a petition in support of the application for review filed by the National Black Media Coalition (NBMC) on April 3, 1985; the Committee's opposition to the application for review,

[1] The Commission, by letter dated April 4, 1985, voted to grant Storer's request for expedited action, but to deny its request for stay of the staff action.

filed April 5, 1985; a reply filed April 8, 1985, by Storer; and supplemental information submitted by the Committee on April 9 and 16, 1985. We also consider Storer's motion, filed April 8, 1985, requesting a stay in the event that it is unsuccessful on the merits, and an opposition to that request filed April 11, 1985, by the Committee.

2. Storer is the licensee of seven television broadcast stations[2] and numerous CARS and other nonbroadcast radio licenses. According to the material before us, the Committee is led by the three Managing Directors of Gollust & Tierney, Inc. (Gollust), which acquired in the past year ownership or voting rights to about 5.3 percent of Storer's outstanding shares. Gollust became convinced that the Storer stock was undervalued and thereafter formed the Committee to seek the votes of other shareholders that might agree with that view. If successful, the Committee intends to elect a new Board of Directors at the corporation's annual meeting on May 7, 1985, and intends to sell Storer's assets in an orderly manner. The Committee states that during the tenure of the proposed new Board, no changes are proposed in the management or policies affecting the day-to-day operation of the corporation or its broadcast facilities.

3. In a cover letter to its application, the Committee stated: "The solicitation of votes from existing shareholders does not involve a change in ownership and, therefore, no transfer of control, since, regardless of the outcome of the election contest, the existing stockholders of Storer will retain complete voting power and economic benefits inherent in stock ownership." The Committee concluded that Commission consent was not required. It did state that to the extent it succeeded in electing its nominees to the Board, an appropriate Ownership Report (Form 323) would be filed. A short-form application was submitted, however, in the event that the Commission thought that its prior consent was required.

4. Storer, in opposition, took the position that control must be found in the existing Board and officers of the corporation. Based on that position, it concluded that the replacement of the existing Board with new Directors must be a transfer of control requiring Commission approval under Section 310(d) of the Act, 47 U.S.C. §310(d). Further, it contended that such a transfer can only be considered on a long form (FCC Form 315), with the accompanying 30-day waiting period and other procedural requirements. Storer thus urged the Commission to dismiss the short-form application.

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[2] Storer is directly the licensee of stations: WAGA-TV, channel 5, Atlanta, Georgia (CBS); WJKW-TV, channel 8, Cleveland, Ohio (CBS); WJBK-TV, channel 2, Detroit, Michigan (CBS); and WTVG(TV), channel 13, Toledo, Ohio (NBC). In addition, through wholly owned subsidiaries, Storer controls stations: WSBK-TV, channel 38, Boston, Massachusetts (Ind); WITI-TV, channel 6, Milwaukee, Wisconsin (CBS); and KCST-TV, channel 39, San Diego, California (NBC).

5. By letter dated March 29, 1985, the staff of the Mass Media Bureau denied Storer's petition to dismiss. It stated that there was support for the Committee's position in the Commission's records. Specifically, the staff referred to the Commission's grant of Storer's application (BTC-8018) in May 26, 1976, authorizing the relinquishment of *de facto* control of the corporation from the Storer family interests to "the general public." The staff construed the phrase "the general public" to mean Storer's stockholders, and observed that Commission records showed no subsequent application seeking to transfer control from "the general public" to the existing Board and management of the corporation. The staff thus found ultimate control in the shareholders. The staff ruling continued:

> Nevertheless, so as to remove any uncertainty as to your authority to proceed, we believe it is appropriate to act on your request for a grant of your applications. In this way the contending parties are free to seek votes of shareholders without a possible cloud on your rights, and any contests can be fought under applicable state, federal or S.E.C. laws or rules.

The staff thought that by granting the applications, the Commission would be removed from what is essentially a dispute among shareholders. It also observed that the grant of the applications compels no changes, but only grants Commission consent in the event that the Committee is successful in its efforts to elect a new Board.

6. The staff believed that its conclusions were consistent with Commission precedent. It also noted that the use of the short form is ordinarily for applications described in Sections 73.3540(f) and 73.3541 of the Rules, and that the Committee's application did not fall into any of the categories in those rules. The staff stated, however, that the Commission has used the short form and associated procedures in other contexts where the public interest would be served, citing *Metromedia, Inc.*, 98 F.C.C. 2d 300, *recon. denied*, 56 R.R. 2d 1198 (1984), *appeal docketed sub nom. California Association of the Physically Handicapped v. F.C.C.*, No. 84-1170 (D.C. Cir., filed May 4, 1984). In the Storer case, the staff believed that the use of short-form procedures would serve the public interest, stating:

> We believe that the use of a short form in this case to permit shareholders to exercise their voting rights as to the internal affairs of the corporation is entirely appropriate. To hold that a long form (along with the procedures associated with the processing of long-form applications) must be submitted and approved before the exercise of the shareholders' ultimate authority to control the corporation may well thwart the exercise of shareholders' rights and insulate the Board from shareholder control.

The application for review and related pleadings followed.

Summary of Pleadings

7. In its application for review and in the pleadings supporting that application, Storer, MAP and NBMC make five contentions: (1) that the locus of control of a large, publicly traded company such as Storer lies in

its Board of Directors and officers, not in the corporate shareholders; (2) that the failure to review the qualifications of those seeking actual working control of Storer is impermissible under Section 310 of the Act; (3) that the staff's action was inconsistent with Commission precedent; (4) that a long-form application, along with associated procedures, must be used in this case; and (5) that the grant of the short-form application had no legal significance.

8. Storer observes that Note 1 to the Commission's multiple ownership rule, Section 73.3555, provides: "The word 'control' . . . is not limited to majority stock ownership, but includes actual working control in whatever manner exercised." Storer describes its shareholders as a diverse and constantly changing group not in privity. They have not collectively sought to set specific corporate policies. In fact, Storer states, a majority of its stock is held by institutional investors that expressly disclaim any intent to control corporate management or policies. Such decisions are made by Storer's existing Board of Directors, which constitutes actual working control. Storer submits information showing that its management has successfully solicited proxies over a three-year period representing 84 to 87 percent of all votes cast. Further, the figures show that management proposals received from 91 to 99.9 percent approval. Storer describes the Committee as a group acting in concert that has recently acquired its stock and that seeks to change fundamental corporate policies. While acknowledging that a majority of a corporation's stockholders can replace the Board, this abstract opportunity is not working control, in Storer's view. Thus, it asserts that an abrupt change in its Board must constitute a *de facto* transfer of control requiring prior Commission approval. It supports this position with various definitions used in securities regulation and by reference to prior Commission and court decisions alleged to be controlling.

9. With regard to the 1976 transfer application described above in paragraph five, Storer states that upon the death of its founder, George B. Storer, his stock went to his executors, with Commission approval. The transfer application in question there is described by Storer as an acknowledgement of the relinquishment of *de facto* control, previously held by Mr. Storer, by his executors. Storer states that the application and the Commission public notice describing it referred only to a relinquishment of control. The only reference to a relinquishment to the general public was in the subsequently filed Ownership Report. Storer urges that, under normal evolutionary processes, *de facto* control passed to the Board after Mr. Storer's death, with no other significant change in the continuity of the company's management and policies.

10. Believing as it does that a *de facto* transfer of control will occur if its Board is voted out, Storer asserts that the Act compels Commission

scrutiny of those who will take over control of the corporation. Failure to do so, it is alleged, may result in alien or criminal control of broadcast stations and violations of our multiple ownership rules. A group committed to the management of news and public affairs programs for private purposes, or that is hostile to equal employment opportunity, according to Storer, could take over a corporation without our approval. Finally, Storer questions the Committee's statement that there would be no changes made in the station's day-to-day operation. It alleges that a Board committed to liquidation would tend to maximize cash flow and hence station sales prices rather than emphasize long-term station improvements in service and facilities.

11. Storer asserts that there is a way to permit Commission involvement by way of a long-form process. The use of a short form here and the need to act expeditiously is brought about by the Committee's delay in filing its application, because it is asserted that the Committee withheld filing so as to keep its plans secret. If it had filed a long-form application several months ago, ordinary long-form procedures could be followed and the requirements of the Act adhered to strictly.

12. MAP supports Storer's position. It also refers to a case in which Howard Hughes made a tender offer for 35 percent of the stock of American Broadcasting Companies, Inc. (ABC). The Commission there determined that it must hold a hearing on Hughes' qualifications, and stated that Hughes was "specifically directed not to exercise any voting rights in the shares of ABC stock acquired or in any way to seek to influence the policies or operation of ABC. . . . ." Unpublished letter dated July 3, 1968, FCC 68-697. MAP urges a similar policy here. Further, MAP states that a disbanded Storer "might not be in a position to produce and syndicate children's television programming."

13. NBMC also supports Storer's interpretation of Section 310 obligations. In its view, Storer is controlled by its management, "in the sense in which 'control' is meaningful for television stations — the ability to direct the company's operation in its interaction with the station's viewers in whose behalf the licenses are held." NBMC contends that the use of the short form has denied it the right to participate meaningfully in the proposed transfer, and denied its rights under Section 309 of the Act and Section 558(c) of the Administrative Procedure Act (APA), 5 U.S.C. §558(c). In this regard, NBMC states that the prompt staff action did not provide time for public participation and that the information contained in the short-form application does not permit anyone to form an educated opinion as to the qualifications of the new slate of Directors. NBMC is also concerned that the Committee or any successor may not be as fully committed as Storer is on EEO matters.

14. In its opposition, the Committee supports the staff ruling. It generally views the proxy contest as an internal corporate election. It takes the position that shareholders own and control a corporation, and the Directors are only fiduciaries for the shareholders. Just as Storer cited numerous authorities to support its position that control is in the Board, the Committee cites other authorities supporting shareholder control. Further, the Committee notes that Storer is an Ohio corporation and, under Ohio law, is required to have annual shareholder meetings. The law also provides that 25 percent of the shareholders can call a special meeting at any time. Incumbent Directors can be removed during those meetings, a fact offered as further evidence of shareholder control. The Committee emphasizes that this case is different from situations where newcomers seek by tender offer, or by private or public purchase, to acquire a large block of stock that would constitute either *de facto* or *de jure* control. Such changes in ownership, in the Committee's opinion, can and do change control, but proxy contests, in contrast, involve no ownership changes. The Committee states that under Ohio law, proxies submitted by either side can be cancelled at any time up until the actual vote, and that they expire at the conclusion of the annual meeting.

15. The Committee believes that the staff's action is consistent with the requirements of Section 310 and Commission precedent. It observes that the Act contains no definition of "control," and quotes with approval the following statement of the court: "We agree the Commission that the statute is to be implemented in accordance with the agency's interpretation that passage of control need 'not be of legal control in a formal sense, but may consist of actual control by virtue of the special circumstances presented.' " *Lorain Journal Co. v. F.C.C.*, 351 F.2d at 829 (citation and footnote omitted). The present case also does not involve a transfer of "legal control in a formal sense," according to the Committee. The Committee further contends that in a widely held corporation actual control is not transferred in a proxy contest unless accompanied by the acquisition of stock, which is not involved here. In any event, the Committee refers to Storer's August 3, 1976 letter, characterizing its activities in connection with our approval of a transfer application (BTC-8018) as relinquishing control to the general public.

16. The Committee continues that even if the upcoming election constitutes a potential transfer, there is no need for using long-form procedures with the attendant delay. Other federal laws concerning contests for shareholder votes call for a policy of evenhandedness and, according to the Committee, we should be sensitive to other federal regulatory schemes in making our own public interest judgments. Short-form procedures are appropriate for four reasons, it asserts. First, the Committee proposes no changes in corporate management or policies

affecting the day-to-day operation of its facilities. Second, the qualifications of participants in proxy contests are subjected to careful public scrutiny as to their background, qualifications and proposed policies in S.E.C. proceedings and, in this case, in courts. Third, it contends that long-form procedures would be wasteful of our resources because at this time we do not know if the Committee will be successful in electing a single Director. It states that any long-form review, if in fact needed, should be conducted after the election, when the results are known. Fourth, the Committee believes that the Commission retains all of its regulatory powers and can explore and resolve any issue that might subsequently surface. It contends that the use of long-form procedures would either impair of preclude a shareholder challenge to incumbent Boards of publicly held licensees. It concludes: "Because of the importance of preserving the free exercise of corporate democracy, any Commission review at this stage of the proceedings should be conducted by the least intrusive means available. Long form review is simply not consistent with this objective."

17. The Committee also responds to Storer's argument that the delays inherent in the long-form process were brought about by the assertedly tardy initiation of its plans. The Committee asserts that it announced its plans publicly in the time period ordinarily used in such matters. It also contends that beginning earlier would only add to the expenses of an already expensive proxy fight and would further aid the incumbent Board with its access to corporate resources.

Discussion

18. The matter before us raises complex issues. In reaching our decision, we have had to balance a number of competing concerns. Among these are our obligation to implement and enforce the Act on the one hand and, on the other hand, our obligation where possible to construe the Communicatons Act in a manner not inconsistent with corporate law and shareholder rights.

19. Our discussion and the conclusions reached herein are based upon the specific facts of this adjudicatory proceeding in which there is a need for prompt action. We intend to inititate shortly a Notice of Inquiry as to our role in circumstances such as those presented here and in related situations involving "hostile" take-overs. We will initiate such an inquiry in hope of articulating general guidelines, while recognizing that each case will turn upon its specific facts. Nothing concluded herein based upon the record before us should be construed as foreclosing the adoption of different approaches based upon the record developed in our Notice of Inquiry. We will continue to act expeditiously on applications during the pendency of the Inquiry.

20. It is helpful to make clear first what is not involved here. We are not dealing with a case where *de jure* control of a licensee corporation is transferred from one entity to another, which is by far the most frequent kind of transfer proceeding. Nor is this a case where we have issued a license to a corporation that is under the *de facto* control of an individual or group by virtue of substantial stock ownership (such as was the case when Storer was controlled by its founder, George B. Storer), and that individual or group seeks to transfer shares and control to another individual. These transactions will continue to be treated as they have in the past, requiring long-form applications seeking our consent to the transaction.

21. Rather, in this case, a relatively small faction of Storer shareholders, with about 5.3 percent of the voting shares, seeks to persuade the holders of the remaining 94.7 percent that a change in corporate direction would best serve the interests of the corporation's shareholders. Although the Committee may be able to persuade other shareholders to adopt their position at the May 7 annual meeting, they will succeed by the merits of their arguments, not by the weight of their 5.3 percent voting interest. There is no basis for finding that this small interest constitutes *de facto* control, particularly given the fact that any proxy rights given to the Committee expire after the annual meeting. *See*, Ohio Revised Code, Section 1701.48(C) (1); 17 C.F.R. §240, 14(a)-4(d)(2). *See also Press Union Publishing Co.*, 7 R.R. 83, 87 (1951) (proxy does not transfer control because "the person to whom a proxy runs is merely the agent for the giver thereof"); *Pacific Power and Light Company*, 42 F.C.C.2d 375, 377 (1973)(a 9.6 percent interest in a publicly traded company found not to constitute *de facto* control). In fact, there are other institutional investors, according to Storer, that hold larger blocks of stock than the Committee. In short, this case is an intra-corporate proxy contest, not an attempt to acquire *de facto* control by the purchase of a large block of stock such as found, for example, in *Pacific Power and Light Company, supra.* The Committee is, in effect, conducting a referendum on an issue of corporate direction and asking shareholders to express their preference by electing a new Board of Directors. Even if the Committee is successful, no ownership shares in Storer will change hands as a result.

22. Section 310(d) provides in pertinent part:

> No. . . station license . . . shall be transferred . . . by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission. . . .

The Act provides no definition of control. When dealing with cases not involving *de jure* control, there can be no hard and fast rules, because corporate control varies from case to case and cannot be precisely defined. *See New International, PLC*, 97 F.C.C. 2d 349, 355 (1984), and *Metrome-*

dia, Inc., 98 F.C.C. 2nd at 306. The meaning of a statutory reference to "control" will also vary from statute to statute depending upon the purpose of the statute, the context, and the legislative intent. We do not believe we are bound, therefore, by statutory and common law definitions of "control" in securities law, although, of course, those precedents are useful. We also note that the Commission is given wide latitude in interpreting its own legislative mandate. *See, e.g., F.E.C. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969). We have nonetheless reviewed the caes relied on by the parties. One prior case did, in part, involve a proxy contest, but it contains factors not presented to us here.[3] We find no case expressly addressing the applicability of Section 310 to proxy contests. Nor are we able to find any case that finds, without the presence of additional factors, that control rests in a corporate Board, or any case that decides which form or procedures to use in passing solely on the qualifications of a new Board. In summary, every case cited by the parties involves transfers of interests in stock. None involved mere proxy contests, where shareholders are, in effect, exercising their right to vote their stock on a single issue, after which all interests (voting and otherwise) remain in those same shareholders. We therefore agree with the Committee that no past Commission case governs here.

23. Turning to the specific matter before us. We must determine initially whether a cognizable transfer of control would occur within the meaning of Section 310, if the Committee is successful and an entirely new Board of Directors is elected in this case. If we find that a cognizable

[3] That case is *Teleprompter, Inc.*, 40 F.C.C.2d 1027 (1973). There, Mr. Irving Kahn was one of the founders of Teleprompter and served as Chairman and Chief Executive Officer. He held the right to vote his own shares and those of others amounting to a total of about 8.2 percent of the corporation's shares. He also had, by agreement, the right to vote an additional 16 percent interest owned by Mr. Jack Kent Cooke, giving Mr. Kahn a total of 24.2 percent of the votes and control of the Board. In October, 1971, a jury convicted Mr. Kahn of several federal crimes, and he resigned his position as Chairman and Chief Executive Officer. Further, under the terms of the agreement, he lost his right to vote Mr. Cooke's shares upon his resignation from those positions. His voting interest therefore decreased from 24.2 percent to 8.2 percent. Mr. Cooke regained the right to vote his 16 percent interest. By soliciting proxies, Mr. Cooke subsequently succeeded in replacing the Kahn Board. (These facts are compiled from the Commission's decision and from *Cooke. v. Teleprompter Corp.*, 334 F. Supp. 467 (S.D. N.Y. 1971), which was cited and quoted in the Commission's decision). *Teleprompter* thus involved a transfer of *de facto* control between two shareholders, a circumstance not present in the instant case. In addition, in *Teleprompter*, Mr. Kahn had enjoyed an on-going right to vote 16 percent of the shares by virtue of a voting trust agreement. This interest in 16 percent of the shares reverted to Mr. Cooke upon Kahn's resignation. This transfer of an on-going voting interest in a substantial number of shares is another factor not present in this case. It is noteworthy, moreover, that although the Commission found that a transfer of control was involved, it did not call for a 30-day wait or petitions to deny.

transfer would occur, Section 310 requires that the Commission review and approve the transfer before it occurs. We must next determine what kinds of procedures are appropriate in order for the Commission to review the proposed transfer. A majority of the Commissioners (Quello, Rivera and Patrick) conclude that there would a transfer of control within the meaning of Section 310, if the Committee is successful and an entirely new Board is elected.[4] Chairman Fowler and Commissioner Dawson would not find a transfer of control and dissent to paragraph 24, and concur as to the rest. On the issue of whether the change in control is "substantial" within the meaning of Section 309, a majority concludes that the transfer is not "substantial" and, therefore, that a long-form is not required. They conclude that a modified short-form is appropriate. Commissioner Patrick is joined in this conclusion by Chairman Fowler and Commissioner Dawson, who, given the majority conclusion that replacing the Board of Directors constitutes a transfer of control within the meaning of Section 310, conclude that it is not a "substantial" transfer for purposes of Section 309. Commissioners Quello and Rivera dissent on this point, finding that the transfer is substantial and requires a long-form application.[5]

24. We first turn to the threshold question of whether a transfer of control within the meaning of Section 310 would occur if an entirely new Board of Storer is elected. We find that such a transfer would occur. We believe that Storer's Board has a sufficient degree of corporate control such that an abrupt change of the entire Board under these circumstances requires prior Commission approval under Section 310.

25. Because transfers subject to Section 310 require our prior approval, we are required to accept Committee's application for filing and act upon it in advance of the shareholders' vote. This is required because new Directors take office at the close of the meeting, under Storer's bylaws.[6]

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[4] Commissioner Quello's concurring statement describes additional bases for his conclusion that a transfer of control would occur.

[5] COmmissioner Rivera's separate statement outlines a two-part procedure that would postpone long-form review until after the proxy contest.

[6] One of the issues that we intend to explore in our Notice of Inquiry is whether we can structure an application review procedure after the vote is completed in a proxy contest. Our concern is that any uncertainties as to a party's legal capacity to act in the event he or she is successful in a proxy contest will unduly hamper that party's ability to secure shareholder votes if the uncertainty is not resolved before the vote. This is a significant concern because, while complying with out statutory and public interest obligations, it is our utmost desire to remain *neutral* as between dissatisfied shareholders and management. A second problem associated with structuring a post-vote application review procedure involves the impact of different state corporations codes upon questions relating to when a newly elected Board of Directors is entitled to act, and the rights and responsibilities of the former Board serving in the interim. Any delay occasioned by an application review procedure might affect these questions. We are concerned that any

By reviewing a proposed slate of Directors in advance, we take no position on the merits of their proposals and remain steadfastly neutral as between the Committee and Storer's current management. We seek to comply with our statutory obligations and remove the Commission from the intra-corporate dispute. In passing upon the proposed Board of Directors, we seek to determine only if they would be legally qualified to serve if they are successful in persuading a majority of shareholders of the merits of their position.

26. Having concluded that Section 310 applies to this case, we must next determine what type of Commission review is necessary prior to the shareholders' vote.[7] This question turns upon whether the transfer involves a "substantial change in ownership or control," within the meaning of Section 309(c)(2)(B) of the Act. Section 309 adopts general classifications of applications and prescribes a thirty-day public notice period for certain of them, (i.e., long-from procedures), excepting applications from this requirement where they do not involve a "substantial change in ownership or control." The statute goes on to authorize the Commission to "adopt reasonable classifications of applications and amendments in order to effectuate the purposes of this Section." *See* Section 309(g). As noted earlier, statutory references to "control" and "substantial" control must be interpreted in light of the purposes of the statute, the context, and the legislative intent. The Commission is given wide latitude in interpreting its own legislative mandate. *See* paragraph 22, *supra*. In addition, in this case the controlling statute expressly authorizes the Commission to adopt such other "reasonable classifications of applications" as will effectuate the purpose of the statute.[8]

27. Turning to the question of whether a change in Storer's Board as proposed by the Committee would involve a "substantial" change in control, we first note that no change of ownership is involved. Nor is there

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delay not result in depriving broadcast properties of effective management for any period of time. Each of these questions and potential problems would have to be thoroughly explored in our Notice of Inquiry were we to attempt to structure a post-vote application review procedure.

[7] The long form is typically used when an entirely new legal entity seeks to acquire ownership of a licensee corporation. The long form therefore requests information as to that new entity and as to any changes in proposed station operation. In this case, Storer remains the same entity, and most of the information requested by the long form is on file or inapplicable. The short form requests less of the information that would be inapplicable in this case, but specifically does not ask for information as to Directors.

[8] *Report on Communications Act Amendments, 1960*, H. Rep. No. 1800, 86th Cong. 2d Sess., *reprinted in* One Star Volume R.R. p. 10:413 (1960), states at R.R. p. 10:418: "Subsection 309(g) authorizes the Commission to adopt reasonable classifications of applications and amendments to carry out the purposes of this section. It is intended under this provision of the committee substitute [that] *such classifications could be adopted by the Commission on a case by case basis* or by rule." Emphasis added.

a change in voting rights, since all that is being transferred here are proxies that expire after the meeting. In short, there is no change in the shareholders' ownership or voting rights. The change is limited to the composition of the Board of Directors, who are fiduciaries of the shareholders. Storer's shareholders retain ultimate, legal control. They retain the power to vote out an existing Board by majority vote. They retain the power to call a special meeting at any time with a twenty-five percent shareholder vote. And they retain the power to approve or disapprove major corporate actions — including a decision to sell all or substantially all of the corporate assets or to liquidate the company. Indeed, a two-thirds shareholder vote is required for such an action under Ohio law. *See*, Ohio Revised Code, Sections 1701.76, 1701.86. Accordingly, the shareholders retain ultimate control over the very result sought by the proposed new Board. In addition, it is important to note that, if the proxy contest is successful, any application for transfer of a license from Storer to a third party would also be subject to formal, long-form review by the Commission at that time.

28. In this case, existing shareholders, as of a specified date of record, will vote at the annual shareholders' meeting. Any resulting change in the Board arises from the shareholders' exercise of their substantial control, not a *transfer* of the same. Not only will Storer's shareholders — who retain ultimate and legal control — remain the same, but the corporate legal entity will remain unchanged by the election of a new Board. Its employment, network affiliation, programming and other contracts will remain in effect. Its corporate representations to us will also remain the same.

29. For all the above reasons, we conclude that the change of the Storer Board as a result of a proxy contest is not a "substantial change in ownership or control" within the meaning of Section 309(c)(2)(B). This conclusion is consistent with prior precedent. The test we have applied for whether a transfer constitutes a substantial change in control has been linked to the transfer of stock or on-going voting interests. *See Metromedia, supra; Grace Missionary Baptist Church*, 48 R.R.2d 129, 134 (1980). There would be no change in the ownership or on-going voting interests in the event the Committee is successful in this case, reinforcing our conclusion that the change is not "substantial" within the meaning of Section 309(c)(2)(B).

30. We can put the issue in context by looking at some of the categories of transfer applications that the Commission has already found to involve transfers of control requiring Commission approval, but found *not* to involve substantial changes in control requiring long-form procedures. Among these are applications concerning corporate reorganizations, transfers of the licensee from a partnership to a corporation not

involving substantial changes in ownership, and transfers from a parent to a subsidiary corporation. *See* 47 C.F.R. §§ 73.3540(f) (1), (4) and (5). With respect to the last situation, our rules currently apply short-form procedures to an "[a]ssignment or transfer from a corporation to a wholly owned subsidiary thereof or vice versa, or where there is an assignment from a corporation to a corporation owned or controlled by the assignor stockholders without substantial change in their interests." Section 73.3540(f)(5). The circumstances described by this rule are analogous to the matter at issue. In both, ownership interests remain the same while the Board of Directors responsible for the license may change entirely. In applying these rules, the Commission has routinely found no substantial change in ownership or control and utilized short-form procedures under these circumstances.

31. *Metromedia. Inc., supra,* provides another relevant precedent. There, we approved the use of a short-form application to permit the transfer of control of Metromedia, Inc., from a person in *de facto* control to the same person in *de jure* control, even though the rules governing the use of short forms (Sections 73.3540(f) and 73.3541) do not explicitly cover such transactions. Finally, a person or entity that we have already passed upon can go from less than a controlling position (for example, a 15 percent interest) to *de jure* control (for example, a 55 percent interest) using a short form and associated procedures, as long as the interest passing is less than 50 percent. *See, e.g., Clay Broadcasting, Inc.,* 21 R.R.2d 442 (1971). We have the obligation and authority to make public interest judgments when new circumstances arise, and can do so in adjudicatory cases. *See S.E.C. v. Chenery Corp.,* 332 U.S. 194 (1947). It is apparent from the rules and cases such as *Clay Broadcasting* that the Commission in the past has looked at the circumstances presented in each case in determining whether a transfer is exempt from formal procedures under Section 309(c) (2)(B). We have done so here as well.

32. Given our conclusion that the transfer is not "substantial" for purposes of Section 309, the Act does not require specific procedures or a minimum 30-day waiting period or petitions to deny. We have nevertheless examined what procedures would constitute a reasonable application procedure within the meaning of Section 309(g) and allow us to fulfill out public interest obligatons under the Act. As noted, this case is unique, and no directly controlling precedent exists to guide us. We share the concerns expressed by Storer, MAP and NBMC that broadcast licenses not be turned over to aliens, law breakers and others who might be in conflict with our multiple ownership rules and policies. At the same time, we have no desire to raise unnecessary hurdles impeding the exercise of shareholder rights under corporate law. Material information must be disclosed under S.E.C. law so that shareholders can make informed choices. We

believe we should also treat the contesting parties evenhandedly. Prompt action is an essential part of evenhandedness, because we remove a question as to the Committee's authority to seek votes for its nominees to the Board. In fact, insistence on long-form procedures in this case would place a cloud on the Committee's authority to act until well after the May 7 shareholders' meeting, potentially affecting its ability to convince shareholders to vote for its proposed Directors. This would not be evenhanded; it would favor the incumbent Board.[9] If we can remove that cloud, the shareholders will be able to cast their votes solely on the merits of the proposals of the contending parties. These considerations guide us in fashioning procedures to use in these unique circumstances.

33. We have reviewed the information called for by the long-form transfer application. For the most part, the information requested is already on file or inapplicable here. For example, there is no question as to Storer's technical or financial qualifications to continue operation of the stations, and there is no contract of sale involved. We are dealing with an existing legal entity that will continue after the election, possibly with a new Board. Its corporate representations are unchanged. As to the proposed new Directors, the only information not requested in a short form that appears relevant here falls in the following areas: (1) citizenship; (2) whether they have been subject to adverse findings or consent decrees regarding "any felony, antitrust, unfair competition, fraud, unfair labor practices, or discrimination", and (3) information as to any attributable interests in cable television systems, newspapers or other broadcast statons. *See* Section II, FCC Form 315. We see no reason to require the filing of a long form to gather other information that is either on file or unnecessary.

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[9] Storer suggests a requirement that those engaging in proxy contests involving broadcast licensees file applications sufficiently far in advance to permit the use of long-form procedures. Of course, we would be obliged to impose such a requirement if it were necessary to satisfy the Act. We have indicated, however, that we no not believe such a procedure is required to satisfy our statutory obligations. While a range of application procedures will be considered in our Notice of Inquiry, we do not believe such a requirement is appropriate in this case. A long-form application procedure requires a minimum of forty-five days and is subject to the possibility of formal petitions and petitions for reconsideration. *See* 47 C.F.R. §§73.3584 and 1.106. Where such opposition pleadings are filed, it may typically require several months to analyze all such pleadings and issue the Commission's decision. The substantial delays which necessarily attend long-form application procedures could inhibit or deter proxy contests and provide an undue degree of insulation to incumbent licensee Board members. It is not the Commission's role to provide this degree of insulation. We believe that we are entitled to weigh this consideration in reaching our decision and in exercising the discretion to adopt reasonable application classifications expressly granted the Commission by Section 309(g).

34. Rather, in order to carry out our public interest obligatons under Section 310, we here adopt a modified procedure. This procedure will consist of a short-form application, supplemented by information as to citizenship, other media interests and any adverse findings as to the law violations described above. In this manner, we shall be notified of any impending changes and shall be able to make a review of the basic information as to the new Directors. This new procedure will also respond to concerns expressed by Storer, MAP and NBMC. We would be able to take any appropriate action if the proposed Storer Directors are aliens or law breakers, or if they have interests conflicting with out multiple ownership rules.[10] Moreover, these modified procedures will permit prompt action on our part, thus removing the Commission from this intra-corporate contest.

35. Under the statutory scheme, it is an applicant's burden to establish its qualifications. Because our modified procedure is new, however, the Committee had no reason to file information at the time it filed its application that was not requested by the short form. The additional information to be reviewed in this case is straightforward, and its analysis does not entail subtle or subjective judgments. A person either is or is not a citizen, has or has not conflicting attributable media interests, or has or has not been subject to adverse findings of law breaking. In this context, therefore, where so many factors remain unchanged, including representations to us as to the operation of the stations and compliance with our requirements, and where there are competing interests to act expeditiously, we conclude that imposing a 30-day delay and permitting formal petitions to deny are not warranted. We note, moreover, that the identities of the proposed Board members have been known to Storer since about March 19, when the applications were filed. The Committee observes that despite careful scrutiny of the members of the proposed Board, both here and before the S.E.C., Storer has not made a single allegation of fact that would question the qualifications of the Committee's nominees to hold office. The Committee has represented that its proposed Board members are all citizens, that they have not been the subject of any adverse findings as to the listed law violations, and that they have no media interests that conflict with out multiple ownership rule or policies. We find, therefore, that the Committee has complied with our modified 316 application procedures announced herein and that application is approved. As noted earlier, such approval signifies only that the proposed directors would be qualified to act, if elected by the shareholders. We do not endorse either group in this contest.

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[10] Gradual changes in a licensee's Board have been reported to us in due course when Ownership Reports are updated. Nothing we say here changes this means of considering evolutionary changes in Board membership.

36. As noted, Section 309(g) of the Act grants us authority to adopt reasonable application procedures to fulfill the purposes of Section 310. In light of the factors applicable in the circumstances presented, we believe that the adoption of the modified short-form procedures is a reasonable exercise of the discretion afforded the Commission under that statute. It permits us to carry out our statutory obligations, while at the same time not frustrating corporate law and the rights of shareholders. For all the above reasons, we believe that the procedures adopted here serve the public interest.

37. There are additional questions that remain to be addressed. Storer and its supporters assert that applicants using short-form applications could lack candor or make misrepresentations in their applications. But that potential problem can also arise where applicants use the long form. We rely on the accuracy of the information submitted, the certifications made as to that information, and the substantial penalties that can be imposed for misrepresentations. We shall so rely in this case, as we do in all other application proceedings. Moreover, the statute provides a safety valve through petitions for reconsideration and revocation proceedings. *See* Sections 312 and 405 of the Act, and footnote 13, *supra*. In addition, informal comments can be filed — and have been filed in this case. Storer also expresses concern that those seeking control of the corporation might program for private purposes, might reduce the production of children's television programming and might attempt to maximize present profits rather than long-term improvements. *See* paragraph 10, *supra*. First, no support is provided for these conjectures. Second, the Committee has represented that it will make no changes in the day-to-day corporate policies and management. Third, if the Committee's object is to maximize the sales price of the stations, it seems to us just as likely a conclusion that it will take whatever steps are needed to make the stations an attractive property, including maintaining or improving ratings and facilities. Significantly, the long-form application asks for no information as to programming for private purposes or as to long-term business practices. On these points, therefore, Storer has as much information to review in this case as it would have had if the applications were a long-form. Finally, we have no basis for taking action because of a speculative loss of children's programming production. As a part of the proposed liquidation of the corporate assets, no reason has been set out as to why a viable program production and syndication activity would not also be sold, and programs still made available to the industry from the buyer. In any event, we do not require any licensee to produce and syndicate programs, and the failure of Storer or any successor to engage in such an activity is not something subject to review.

38. NBMC notes that Storer established the first Minority Broadcast Investment Corporation (MBIC), which has funded a number of minority-controlled broadcast stations. It is concerned about the possible loss of Storer's MBIC. We consider the establishment of an MBIC to be a laudable enterprise, reflecting well on Storer. But we have never required any licensee to establish such a program, so we would not mandate that a licensee with such a program maintain it. In fact, the existing Storer Board is free to modify its support of this program without any notification to the Commission. The speculation that the MBIC may not be continued is, therefore, not a basis for requiring action on our part.

39. Storer states that the new Board "might" be hostile to equal employment opportunity. NBMC adds that Storer station EEO profiles are excellent. It states that when stations are for sale, minorities and women are the first to leave because, "owing to past and present discrimination," they require a longer time to find alternative employment. We have no factual basis for accepting this assertion. In any event, assuming the correctness of the statement, the asserted problem would exist for any station being sold, not just Storer's. Thus, the potential problem does not provide a basis for treating Storer in a manner different from any other licensee. Moreover, we still have Storer's representations as to its EEO programs on file, and the company is responsible for their implementation until such time as the stations might be sold. At such time, the proposed transfer of a Storer license would be fully reviewed by the Commission and any successor licensee's performance will be reviewed in the same way as any other licensee would be.

40. NBMC also contends that a short-form procedure violates NBMC's rights under the Administrative Procedure Act (APA). Specifically, it alleges that 5 U.S.C. §558(c) requires that interested parties are entitled in licensee proceedings to have due regard accorded their rights, and the agency "shall set and complete proceedings required to be conducted in accordance with Sections 556 and 557 of this title. . . ." Both 5 U.S.C. §§556 and 557 refer to hearings required by law. No such hearing is required here, and the general provisions of the APA are not applicable to the specific circumstances of this case.

41. We turn to MAP's suggested alternative procedure, in which it proposes that we consent to the election of the new Board, but subject to the condition that they exercise no control until the completion of long-form procedures. The difficulty with the suggestion in this case, assuming that a new Board is elected, is that it would leave those entitled by corporate law to control the company without authority to act, while those they supposedly replace either leave or remain. The potential for wasted corporate assets or a lack of leadership over possibly long periods of time is obvious. Given these potential detriments of a long form and in light of

our conclusion that the Act does not require long-form procedures in this matter, we reject the suggestion in this case. We shall, however, five further consideration to this suggested procedure in the Notice of Inquiry.

42. We last turn to Storer's request that we stay the effectiveness of this decision so as to permit court review. It reasserts its contention made in an earlier request that Storer and the public would be irreparably injured because there would assertedly be no party left to prosecute an appeal if the current Board is displaced. It adds in its April 8 submission that if the Committee is successful, then key management and operating personnel would search for new employment. The energies devoted to that endeavor, we are told, would be at the expense of normal operating functions.

43. We have adopted a four-element test in determining whether to stay one of our actions: (1) the likelihood that a petitioner will prevail on the merits of the appeal; (2) the likelihood of irreparable injury to the petitioner in the absence of a stay; (3) the injury to other parties in a proceeding that might arise from a grant of a stay; (4) any injury to the public interest that might result. *See, e.g., Parkell Broadcasting, Inc.*, 60 F.C.C.2d 113 (1976); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We believe that Storer has failed to make a sufficient showing. To the extent that a stay clouds the Committee's legitimacy and discourages focus upon the corporate policy issues confronting the shareholders, Storer's shareholders are arguably injured. The injury to Storer is not irreparable. Storer has not amplified its basis for believing that no party will remain to prosecute an appeal, which we rejected in our April 5, 1985 decision. It will only have to undergo the legally required proxy fight, which we do not believe is a cognizable injury. The possible changes in some personnel may be true, but that is the case in dealing with any sale of a broadcast station. Storer did not, for example, claim irreparable injury on this ground when it sold its radio stations several years ago. For these reasons, the request for stay will be denied.

44. We have reviewed the matters before us and conclude that a grant of the modified Form 316 application satisfies the applicable statutory and public interest requirements. Both sides of the controversy, therefore, will be free to proceed to convince shareholders of the merits of their respective positions, without impediment or assistance from this agency.

45. Accordingly, IT IS ORDERED, That the applications (BTCCT-850319KK - KQ), as modified, ARE GRANTED.

46. IT IS FURTHER ORDERED, That the request for stay filed April 8, 1985, by Storer Communications, Inc., IS DENIED.

47. IT IS FURTHER ORDERED, That the petition filed by the National Black Media Coalition, and the joint comments filed by the Media Access Project, the Telecommunications Research and Action Center, and Action for Childrens Television, and the application for review filed by Storer Communications, Inc., ARE DENIED.

48. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, mail, by certified mail - return receipt requested, copies of this Memorandum Opinion and Order to the parties to this proceeding, and that the Secretary shall cause the same to be published in the F.C.C. Reports.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

STATEMENT OF CHAIRMAN MARK S. FOWLER CONCURRING AND DISSENTING IN PART

In re: Application of the Committee for Full Value of Storer Communications, Inc.

1. I dissent in part. I disagree with the Commission's decision to the extent it finds a transfer of control would occur if the Board of Directors of Storer Communications, Inc. ("Storer") is replaced by means of a shareholder proxy contest. I believe no "transfer of control" cognizable under Section 310 of the Communications Act will result. But since a majority finds that a Section 310 transfer does occur, I find it necessary to consider whether a short-form or long-form procedure applies. Therefore, I agree with Commissioners Dawson and Patrick that the neutral "modified short-form" procedure adopted by the Commission's decision, and not the long-form procedure, is appropriate. For the reasons stated in the majority opinion, I believe that procedure is proper as a matter of law (under Section 309) and policy.

2. As discussed more fully below, the shareholders' ultimate control of a corporation is the only control cognizable under Section 310. The change in Storer proposed in this case results from an *exercise* of control by the shareholders, not a *transfer* of control. Such an exercise of control, even suddenly and after a period of delegation, does not constitute a transfer of control under Section 310. Even if a showing could be made in a specific case that Section 310 control rested elsewhere than in the shareholders, no such showing has been made in this case. *See infra* at 9-11. Storer has provided no sufficient factual basis on which to base any finding of a transfer of control. The majority's finding of one is based on neither fact nor law. Therefore it is arbitrary and capricious.

A. Section 310 Should be Read Narrowly, Minimizing Conflicts with Corporation Law

3. The Board of Directors of a widely-held, publicly-traded corporation exercises a great deal of operational and managerial authority. Nonetheless, for purposes of Section 310, I cannot conclude that the Board exercises control to the extent that a change in the Board would result in a cognizable transfer. In so concluding, I am not being naive about the role of corporate directors. Rather, I believe the Commission must engage in the proper process of statutory construction mandated by Congress' undefined use of the term "transfer of control" in Section 310.

4. I find that it is unnecessary — and, therefore, inappropriate — to read Section 310 so broadly as to affect the well-settled rights of shareholders under state corporation law to conduct a proxy contest or otherwise exercise their rights to vote for directors. The Commission should construe "transfer of control" in Section 310 in a manner as consistent as possible with corporation law to allow the shareholder actions proposed in this case to proceed without Commission interference or the threat that an unauthorized assignment of the stations would take place.[1]

5. Section 310 provides an opportunity for the Commission to grant assignments of licenses in the public interest. Recognizing that corporations can be Commission licensees, Section 310 provides that transfers of control of a corporation holding a license could constitute an indirect assignment of the license.[2] But neither the statute itself nor the legislative history provide any explanation of what constitutes a transfer of control for purposes of Section 310. This task has been left to the Commission, which over the years on a case-by-case basis has considered the boundaries of its authority to consider changes in corporate licensees.

6. We do not have an unfettered rein in construing Section 310. As a normal matter of statutory construction, we must read Section 310 in a

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[1] The situation presented involving a proxy fight is markedly different from others presented where an unauthorized transfer of control is found by the Commission. The more typical case involves an abdication of shareholder responsibility over a broadcast station to parties *not* under the authority or control of the shareholder. *See*, Lorain Journal Co. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied sub. nom.* WWIZ, Inc. v. FCC, 383 U.S. 967, *reh. denied*, 384 U.S. 947 (1966). That abdication includes day-to-day operations of a station involving programming decisions. In the instant case, there is no abdication of shareholder rights to third parties not under their direct control, but rather an affirmative exercise of those rights.

[2] It is important to remember that Section 310 is concerned only with a "transfer of control" in a corporation which reaches the level of (and, thus can be equated with) the other more clearly defined assignments under Section 310 (e.g., transfer of a station from one sole proprietorship to another sole proprietorship). It is that level to which intra-corporate changes must rise.

manner broad enough to accomplish its purposes, but not so broadly that it unnecessarily conflicts with other laws — in this case, general corporation law. The purposes of Section 310 are clear: under the statute we need an application if there is an assignment of a station to gather facts about the new licensee's "citizenship, character, and financial, technical, and other qualifications. . .to operate the station." 47 U.S.C. 308(b).[3]

7. As can be seen in this case, the conflicts with corporation law also can be clear. Here, some of the Storer shareholders are undertaking a proxy contest, a procedure sanctioned by state corporation law to allow the exercise of shareholder control. In essence, a proxy battle is an internal debate among shareholders over corporate issues, ideas, and policies. The present Storer Board has voted not to follow the direction urged by The Committee for Full Value of Storer (the "Committee"). The Committee proposes a new slate of directors to replace the slate up for election in the normal course of the annual shareholder meeting. To assume that this proposed activity requires a stamp of government approval under Section 310 could be discordant with the corporation law principles which allow such a contest to occur in the course of corporate governance.

8. Given these purposes and potential conflicts, and the general desirability of attempting to harmonize where possible corporation laws of the states and the Communications Act, the question then becomes where to fix the locus of control in a corporation for Section 310 purposes. An examination of the rights of shareholders *vis-a-vis* directors indicates that, although directors play an important role in the operation of a corporate licensee, we should draw the Section 310 line at the shareholders. It is the ultimate control vested by law in the shareholders on which we should focus for Section 310 purposes.

B. Ultimate Control Rests in Shareholders

9. I believe this position is consistent with general corporation law. As a matter of law, everything that a corporation legally can do relates back to the shareholders acting within their rights and powers. Ohio law, which governs Storer, an Ohio corporation, states that the shareholders elect the members of the Board and the source of any power exercised by the Board is traceable to the shareholders. *Mayer v. Cincinnati Economy Drug Co.*, 103 N.E. 2d 1, 4 (Ct. Ap. Ohio, 1951). Directors are constrained in their activities by their fiduciary obligation to act in the best interests of the shareholders. *Ohio Drill & Tool Co. v. Johnson*, 625 F.2d 738 (6th

[3] Of course, the corollary is that if there is no need to gather information about these qualifications (or if the information can be gathered through another procedure — such as the FCC Form 323 Ownership Report procedure) and the statutory requirements can be fulfilled without Section 310, no Section 310 transfer would occur.

Cir. 1980). They also may be constrained specifically by direction from shareholders; and indirectly because they can be removed from office by shareholders.

10. The Board of Directors has authority to manage the affairs and operation of the corporation. But shareholders elect the Directors; in Storer they elect or re-elect the Board annually and, upon a vote of 25 percent of its shareholders, can call a special meeting and then elect a new Board. Indeed, under many state corporation laws, and in the Model Business Corporations Act, shareholders can remove directors with or without cause.

11. Moreover, the authority and powers of directors are limited to actions in the ordinary or regular course of business of the corporation. For example, directors alone cannot reorganize a corporation, change the basic character or wind up the affairs of a corporation and liquidate it. Generally, shareholders, not directors, change by-laws; shareholders, not directors, change corporate Articles. In some corporations, shareholders elect the principal officers. By vote, shareholders can alter the policy direction of a corporation, setting long range policy if necessary.

12. I am aware that in the widely-held corporation of today, the role of the Board of Directors in managing the affairs of the corporation has increased. Much of the shareholder voting is done by means of proxies, oftentime given to incumbent management in *pro forma* fashion.[4] But neither of these factors dissuades me that the relevant control rests with shareholders and not directors.

C. Many Delegations of Authority Affect Management

13. Clearly many delegations of authority affect the management of the modern, widely-held corporation. Committees of the Board[5] and officers may exercise substantial management of a corporation. In the case of licensee corporations, more likely than not it is station management (which may or may not consist of corporate officers) that effects day-to-day management of the stations. Station managers make key decisions setting station editorial policy, deciding on programming, and assuring

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[4] Proxy committees unquestionably can favor incumbents, and much of a corporation's business at a shareholder meeting can be conducted using proxies. But for Section 310 purposes we obviously are not concerned with the average subject of a proxy solicitation. An incumbent management which operates the proxy mechanism may do so for ordinary issues of corporate governance. On the major issues, as might be seen in the instant case, that ability to operate through an incumbent proxy committee may not work at all. This illustrates clearly that an incumbent committee only operates the proxy mechanism if the shareholders do not disagree and do not exercise their rights to control in a manner inconsistent with incumbent management's proposals.

[5] Storer's by-laws provide for the election of an Executive Committee of at least three Directors with delegated authority to act for the Board.

compliance with Commission rules. Yet clearly control does not rest in the occupants of these positions for purposes of Section 310 so that prior approval of the Commission is needed before a change can be made in these positions.

14. The Commission has recognized that the actions of these employees is controlled by a higher corporate authority which can change the long-term policy, remove the employees, or otherwise exercise the control which may temporarily rest in the officer, manager or other employee. The Commission cannot simply view all indicia of authority delegated to a person or group as within the meaning of control for Section 310 purposes.[6]

15. In the same vein, I find that for Section 310 purposes the actions of the Board are subject to the discretion of a higher authority which can change long-term policy, remove the directors or otherwise exercise control of the corporation. But simply because shareholders might fail to exercise their control, it does not follow that directors or management have control. The shareholders still have it. As the Commission said in *Paramount Television Productions, Inc.*, 17 FCC 264, 342 (1953):

> Even a majority stockholder is frequently content to let others take a major role in management, but it would hardly be suggested that majority stock interest is not a controlling interest merely because it has, as a matter of policy, refrained from exercising this control.

This case could demonstrate the transient nature of the director's authority. Here, the Storer directors voted not to follow the direction urged by the Committee. yet this proxy fight may prove the Directors powerless in relation to the shareholders who may decide they need to exercise their control and override the Board's decision. The Commission must recognize that in the corporate hierarchy, the shareholders exercise the ultimate control; there is no higher intracorporate authority. It is this distinctive character of the shareholders which convinces me that the Section 310 line should be drawn at the shareholders. In my view, if the Commission draws the line anywhere else, it does so without reasonably distinguishing between the many layers of delegation of corporate authority.[7]

D. Directors Not Necessarily Actively Managing

16. The corollary argument made is that shareholders are too aloof and the exercise of shareholders' control is too cumbersome. I believe that Storer and the Commission majority have a similar problem distinguishing

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[6] As to station managers and other non-officer employees, the Commission does not even view these positions as cognizable under the attribution rules for purposes of the Commission's ownership rules.

[7] Carried to its logical conclusion, this would require transfer applications every time anyone in management changed.

the shareholders and Directors on this ground. Is Storer really trying to paint the picture of the "real world" Board with shirtsleeves rolled up directing the day-to-day operation of the corporation and the stations? In theory, and often in practice, the Board can be as aloof as shareholders, meeting infrequently and giving only broad policy directives. For instance, Storer's by-laws mandate only annual Board meetings; more frequent meetings are merely discretionary. More frequent decisionmaking can be delegated to the three person Executive Committee or to the officers. Attempting to have the Board make day-to-day operational decisions would be extremely cumbersome and expensive.

17. It is for this reason that much corporate authority is delegated and officers and employees manage the day-to-day affairs of corporations and stations. Often the officers set policy for the corporation which is merely reaffirmed or ratified by the Board. But simply because, for practical considerations, the Board does not exercise all its authority, it does not follow that if it does exercise its rights something new or dramatic has occurred. Such is the very essence of delegation. Nor should it be any different as to shareholder rights and power. *See supra* at 5. Therefore, I can see no reason for distinguishing on this basis between the shareholders and a Board with such broad powers of delegation.

18. As the above discussion makes clear, I do not decide any general question of the laws of control in a corporation. Rather, I have recognized that there is more than one center of operational authority; but there is only one locus of ultimate control. For the purposes of determining whether there has been an assignment of a station license by a corporate licensee, the Commission in this case should look only to changes in that ultimate shareholder control.[8]

E. Looking to Shareholders conjoins With Other FCC Policies

19. This view that ownership is the relevant consideration is consistent with other Commission policies. For example, in weighing proposals at the initial licensing phase, the Commission looks to the owners of the applicant for comparative purposes. For purposes of our tax certificate and distress sale policies, we look to minority *ownership*. For purposes of the special minority ownership provisions established in a recent revision of the broadcast multiple ownership rules, the Commission considered only ownership.

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[8] Section 310 refers to transfers of corporate control in the context of the discussion of assignments. Here, there will be a clear opportunity if, and when, the Storer stations are sold for the Commission to fulfill its statutory obligations under Section 310. Given the equation of assignment and transfer of control under the Act, it would seem that the mere proxy vote would not reach Section 310 proportions, but that Commission review would come when transfer of the station occurs. To duplicate the Commission approval serves no real purpose under the Act.

20. Moreover, it is not a new concept that there is a class of intracorporate individuals or entities which have an influence on our licensees, but in which the influence does not reach the Section 310 level. The Commission already has established such a classification in adopting attribution rules for multiple ownership purposes. Thus a 5 percent shareholder may not be able to control a corporation, but the Commission desires to take regulatory cognizance of him. Similarly, the Commission recognizes directors and officers of a corporate licensee for attribution purposes, but that level of interest need not reach the Section 310 level. Thus, a director's involvement can be recognized without suggesting that it is greater than, for example, a major shareholder in a corporation where another shareholder is in *de facto* control.[9] In these attributable-but-not-controlling situations, such a shareholder may have significant influence and involvement, but clearly is not in control for Section 310 purposes. I view directors in an analogous position vis-a-vis shareholders for Section 310 purposes.

F. Proxy Contest is an Exercise, Not A Transfer, Of Control

21. In this case, a group of Storer shareholders comprising a 5.3 percent voting interest is attempting to convince enough other shareholders to vote with it on a basic question of corporate direction. If it is successful, the shareholders will elect a new Board which will be obliged to function as a fiduciary to them. Shareholders of record are fixed, so the contest — the event triggering the Section 310 question — involves a vote of present shareholders. It will not result in — or from — an addition to, or loss of, any shareholder's voting interest or the introduction of new shareholders. It is simply a vote by those owners of the corporation who have the right to vote, an exercise in corporate democracy. Thus, it is the *exercise* of control, not a *transfer* of control.

22. If change results, it will be the reflection of the desires of the shareholders. If change does not result, it too will be the reflection of the desires of the shareholders. Exercise of control through shareholder voting, though it may be sudden and infrequent, does not constitute a transfer of control for Section 310 purposes.

23. Taken to the natural conclusion, the position urged by Storer could require Commission approval of all kinds of exercise of rightful corporate control by shareholders. A change in corporate policy, or in the Board, may be due to reasons entirely separate from the operation of the

[9] Even more telling are the single majority shareholder provisions of our attribution rules, where interests of minority shareholders are not cognizable if there is a single majority shareholder.

broadcast stations, and may have no effect on them.[10] There are innumerable other obligations of corporate licensees, their boards and officers not inconsistent with the obligations as licensees. When the Commission interferes with the former on the unsubstantiated chance that something might affect the latter, it runs a very great risk of overstepping its bounds. This is particularly true where, as here, it has an opportunity to review any subsequent station assignment under Section 310 if the stations are sold. Commission scrutiny of such intracorporate affairs is well beyond the scope of any Section 310 obligation to review assignments of station licenses.

24. None of the applicants for review of the staff ruling has demonstrated why the Commission would be justified in creating a cloud of uncertainty over this legitimate exercise of corporate governance where intrusion is not necessary to fulfill the Commission's obligations under the statute. None has shown why the ultimate control, rather than the day-to-day management, is not the proper focus for a Section 310 determination, particularly when the Commission declines to review, for the purposes of the statute, changes in corporation employees and officers more directly involved in the operation of the stations.

G. Burden of Proving Control in Directors Not Met

25. As discussed above, I believe that under Section 310 the Commission should look only to changes in shareholder control. Even if a showing could be made in a peculiar case that the Commission should look elsewhere for Section 310 purposes.[11] clearly nothing before us suggests this is such a case.

26. The question is whether, as a matter of fact, Storer has met its burden of proving that control now lies in the Board and not in the shareholders generally.[12] I believe Storer has not met that burden.

27. Storer's inability to meet its burden is illustrated by its remarkable difficulty in identifying exactly who has *de facto* control of the corporation. Storer seems to admit that George Storer, the company's founder, was in *de facto* control of the corporation before his death in 1976. In its

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[10] The attribution rules allow a licensee to make a showing that certain directors' duties and responsibilities are not related to the broadcast operations of the corporation. In those circumstances, the directors are exempted entirely from attribution.

[11] For the reasons detailed above, I do not believe such a showing could be made, but our case-by-case approach in Section 310 cases provides an opportunity for such a showing in a particular case with unique or unconventional provisions for corporate governance.

[12] Under Commission rules, the licensee is responsible for informing the Commission if there has been a shift in *de facto* control. It clearly follows that here, where the corporation contests the Commission's determination of the locus of control based on the corporation's latest filing, the corporation has the burden of showing control rests elsewhere.

most recent filing on the issue of control of Storer, in 1976 upon the death of George Storer and the disbursement of his stock, Storer's Vice President and Washington counsel *informed* [13] the Commission that *de facto* control had passed from George Storer to the "general public," presumably the corporation's shareholders.

28. Now, without providing an adequate factual basis for the assertion, Storer claims *de facto* control rests elsewhere. The Commission can only accept that assertion if Storer meets its burden of showing when and how that shift in control occurred.

29. In its pleadings in this case, Storer first argues that despite its representation to the Commission in 1976, the "management group," which seemed to include the nine-member Board of Directors as well as the officers and "management" of the corporation, somehow came into *de facto* control between 1976 and the present. *See e.g., Petition for Dismissal of Application* at 3. However, in its reply, Storer for the first time appears to argue that a triumvirate of directors — the composition of which has changed over the past three years — is in *de facto* control of the corporation. Given this inconsistency in representations to the Commission, it is virtually impossible to determine that, as a matter of fact, some person or group is in *de facto* control of the corporation.

30. Moreover, I cannot accept Storer's bald argument that control lies in the Storer management because that is where "actual working control" lies. As evidence of that control, it points to the facts that the Storer board and management determine operational policies for all of its stations, and that it solicits and votes a majority of all outstanding shares. This bald showing does not reach the evidentiary level to which Storer must rise to rebut the strong presumption based on the facts now before the Commission that control rests with the Storer shareholders.

31. In *Metromedia, Inc.*, 98 FCC 2d 300, *recon. denied*, 56 R.R. 2d 1198 (1984), *appeal docketed sub nom. California Association of the Physically Handicapped v. FCC*, No. 84-1170. (D.C. Cir., filed May 4, 1984), where the Commission accepted the licensee's assertion that John Kluge

[13] Storer's view of the transfer of control in 1976 could hardly be more inconsistent with its current view. Then, Storer, even though admitting that a *de facto* transfer had occurred, merely attached an ownership report to a letter from its Vice President and Washington counsel explaining the transfers occasioned by the death of George Storer. Opposition to Application for Review, Exhibit B. Now, however, Storer argues that a long form application is necessary to effect what they claim is a *de facto* transfer of control, although the proposed change clearly is no more significant this time. It is also worth noting that that letter also attached a "further letter listing proxies given to management by officers, directors, and one percent or greater stockholders in connection with the July 21, 1976, special meeting of the stockholders at which the 646,229 share redemption was approved, together with a copy of the proxy form and the notice of special meeting of stockholders." *Id.* Even so, Storer eschewed any finding that any person or group was in *de facto* control of the corporation.

had been in *de facto* control since the beginning, the Commission relied on substantial evidence showing that Kluge exercised control by virtue of his large stock interest (26 percent), his ability to elect Board members, and his positions as Chief Executive Officer and Chairman of the Board.

32. Clearly, Storer has not demonstrated its claim with the type of substantial supporting evidence that the Commission demanded in the past. Moreover, the information Storer has provided is internally inconsistent and in direct conflict with its 1976 filing finding control in the shareholders. This should make it impossible for the majority to find with any certainty that control rests anywhere besides in the shareholders. As a result, the majority's finding that a transfer of control has occurred is without the requisite factual basis, and none is offered by it other than a conclusory statement. Thus, the majority's finding of a transfer of control is arbitrary and capricious.

33. Rather than meeting its burden, Storer seeks to have the Commission determine that, as a matter of law, the Board of Directors of a corporation is always in control for Section 310 purposes. For the reasons detailed above, this I cannot do.

H. Public Interest Served

34. I come to this decision confident that, were it adopted by the majority, the Commission would be exercising the level of review required by the statute, and content that I have drawn a realistic definition of control. Clearly, every change within a corporation could be argued to be within the meaning of Section 310 control. Were there no ill effects of such a statutory interpretation, and if the Commission had unlimited jurisdiction to interfere in the internal affairs of state chartered corporations engaged in activities protected by the First Amendment, I might entertain treading so aimlessly and boisterously. But I do not believe the Commission has the jurisdiction.

35. And, Commission interference does carry with it other costs. It interferes with the balance of corporate power established by corporation statutes, corporate charters, and by-laws. In this case, for instance, the shareholders who, by a majority vote, would vote a change in the composition of the Board and so in corporate policy, would need Commission approval of that decision. Such interference improperly would insulate excessively Board members with a Section 310 shield from responsibility to the company's shareholders whose rights to control are basic in the scheme of corporation law.

36. As the forms of the entities holding Commission licenses have become more complex and varied than simple proprietorships, general partnerships, and closely held corporations, this need to read Section 310 in context with the general principles of corporation law has become more

important both as a matter of law and as a matter of policy. As a matter of law, I believe the Commission must try to read Section 310 narrowly, in a manner minimizing conflicts with corporation law principles. As a matter of policy, the Commission should try to avoid inhibiting the rights of corporations, and their owners and managers, to the extent we still can fulfill our responsibility to grant prior approval to transfers of control of corporate licensees without unnecessary intrusion. Publicly traded, widely-held corporations in particular provide a means of effecting capital formation, and provide large and small investors nationwide an opportunity to invest in broadcast businesses which require large amounts of capital.

37. I believe these goals can be accomplished without finding a transfer of control occurs in this case. Information about new directors is filed by a licensee on a Form 323 Ownership Report in the normal course of compliance with our rules. I believe this filing provides the Commission with the information needed to assure that our rules are complied with by the licensee.

Statement
of
FCC Commissioner James H. Quello
Concurring in Part and Dissenting in Part
April 22, 1985

In re: Application of the Committee for Full Value of Storer Communications, Inc. for Consent to Transfer of Control of Storer Communications, Inc. File No. BTCCT-850319KK-KQ

I concur in the finding that the Committee for Full Value of Storer Communications, Inc. (the Committee) is seeking to effectuate a transfer of control of Storer Communications, Inc. (Storer) and that this transfer is subject to the provisions of Section 310(d) of the Communications Act. I respectfully dissent to the majority view that this is not a "substantial" change of control that is subject to the full provisions of Sections 309(b) and 309(d) of the Act.

Congress has established specific requirements — particularly a 30-day holding period and opportunity for the filing of petitions to deny — that must be followed before a "substantial" change in control of a broadcast license may be completed. *See* 47 U.S.C. 310(d), 309(b), and 309(c). In addition, it is well settled that the "control" to be considered under this statutory scheme need "not be control in a formal sense, but may consist of actual control by virtue of the special circumstances present." *Lorain Journal Co. v. F.C.C.*, 351 F.2d 824, 829 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), *quoting, Town and Country Radio, Inc.*, 15 Radio Reg.

(P&F) 1035, 1057 (1960). Accordingly, the Commission is obligated to examine the particular facts of this case.

The Transfer Issue

Briefly, a transfer of actual or *de facto* control would occur if Storer's shareholders adopt the Committee's proposal because:

(1) *de facto* control of Storer does not now rest with the institutional shareholders who hold a majority of stock, but rests instead with a management group that controls the corporation's proxy solicitation process; and

(2) a group of shareholders that is unassociated with the Storer management group (the Committee) seeks to effect a change in actual control by installing its own slate of directors and by establishing a drastically different corporate operating policy.

The record shows that Storer's shareholders do not exercise actual control over the corporation. As is generally the case in a large corporation, responsibility for "formulating business policy" at Storer rests formally with the corporation's board of directors. *See* Opposition to Application for Review, Exhibit A (Amended Code of Regulation of Storer Broadcasting Co., Article V, Section 7). In addition, the Commission generally looks to the directors, and the officers they appoint, as the persons properly in control of a corporation. *See, e.g., RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 ((1980), *remanded on other grounds, RKO General, Inc. v. F.C.C.*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 1974 (1982).

More particularly, Storer has shown that *de facto* control of this corporation rests with its management by demonstrating (1) that the corporation's proxy solicitation efforts have achieved the election of management's slate of directors by a margin approaching unanimity over the last three years and (2) that all of management's proposals during this time received overwhelming shareholder approval. *See* Storer Reply to Opposition, at 3-4. There is no indication of any active shareholder involvement in corporate decisionmaking, and it is uncontested that institutional investors hold a majority of the corporation's stock.

The record thus strongly supports a conclusion that Storer is a classic widely-held corporation where actual control rests with those persons who control the board of directors through control of the corporation's proxy solicitation process.[1] Also, since Storer's bylaws grant operating control of the corporation to its board, it would be a clear demonstration of a change in *de facto* control for the existing management group to lose control over the board of directors.

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[1] In analyzing where actual control resides, the representation made in 1976 by Storer's counsel (and vice president) that *de facto* control was relinquished to the general public does not preclude a finding to the contrary when such a finding is required after examination of the facts. *See Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975).

Under these circumstances, the Commission cannot rely on a fiction that it is the shareholders who control the company. While the Commission might wish that Storer had identified more precisely the exact locus of control over the proxy machinery, the failure to identify the individuals in the management group provides no support for a conclusion that control thus somehow reverts by default back to the shareholders. Storer has made a clear showing that *de facto* control has *not* been exercised by the passive institutional shareholders.

For some purposes, such as taking the company private, it might be very important to establish precisely who exercises *de facto* control. Here, however, the existing management group's qualifications are not at issue, and the Commission's sole concern is whether a change in control would occur. Precise identification of the management group's members and their corporate roles is not necessary to the observation that this group will lose control if the Committee succeeds.

Committee principals seek to obtain *de facto* control over the corporation by offering a new slate of corporate directors that would include Committee principals themselves. The argument that the Committee's holdings are too small to permit its exercise of such control ignores the fact that the Committee's board members would assume control over the corporation's proxy machinery as well as take operating control of the company. It is also to be noted that the 5.3 percent of stock under the Committee's control is "in the same order of magnitude" as that of the present controlling management group. *See* Opposition to Application for Review, at 6.

Congress, of course, did not intend that the Commission impose Section 309 or 310 requirements at every routine change in persons exercising some control over a licensee, and the Commission has employed reasonable discretion concerning transfers of actual control. In accord with its obligation to examine the circumstances of each case, the Commission's regulatory approach may be viewed as comparable to having established a presumption against finding that a transfer of actual control has occurred. Evolutionary changes in a corporation's officers and directors are tracked through the filing of annual ownership reports, and this suffices to assure Commission oversight of the process. In this case, however, a complete and immediate change in actual control has been demonstrated, and this emphatically rebuts the presumption against finding that a transfer of control would occur.

The "Substantial" Transfer Issue

The majority decision correctly recognizes that a transfer of control would occur, but it is incorrect in concluding that the agency has discretion to classify this transfer as non-substantial under the Act. The majority's finding that the proposed transfer would not be substantial is

based principally on the lack of change in shareholders' ownership or voting rights.[2] Given that the express language of Section 309(c) applies to changes in either "ownership or control," majority must justify its finding that Congress intended to require a change in "ownership" as well as "control" before a "substantial" change may be found. That burden has not been met, and the circumstances of this case dictate that the change would be substantial.

First, while "substantial" is not defined, the Commission's rules and decisions have generally applied the 309(c)(2)(B) exception to *pro forma* changes and other changes where no transfer of actual control would occur. *See* 47 C.F.R. 73.3540(f). Also, recent Commission decisions demonstrate a strong trend toward reduced interest in formal ownership and increased Commission concentration on actual control. *See Metromedia, Inc.*, 98 F.C.C.2d 300, *recon. denied*, 56 Rad. Reg. 2d (P&F) 1198 (1984) (where a shift in a majority of stock ownership was held to be non-substantial because *de facto* control was unaffected); and *Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Attribution)*, 97 F.C.C.2d 997 (1984) (where the stock ownership level necessary to trigger Commission reporting requirements was raised dramatically).

This trend reflects reasonable Commission efforts to exclude issues that are unnecessary to its purposes, while focusing on the relevant question of control. Such a focus is particularly appropriate when examining a widely-held, publicly traded corporation such as Storer.

Storer's diverse shareholders will have no voice in corporate policy at the upcoming meeting except for exercising the option that may be given to them by the Committee. After they make that choice, control will again rest in the entity that controls the corporation's proxy solicitation process. The lack of change in ownership or voting rights does not reduce even slightly the impact of the proposed change on corporate operations, and thus it does not provide a basis for concluding that this change in control is not substantial.

Second, subsection 309(g) only authorizes the Commission to make reasonable classifications of applications in order to further the purposes of Section 309, and one of these express purposes is to provide a specific period of time during which persons interested in a "substantial" transfer of control may participate formally in the decision. *See* 47 U.S.C. 309(d). Here, all the elements warranting such public comment on the Committee's qualifications are present. There would be a complete change in persons exercising operational control, the Commission has never passed on the Committee principals' qualifications, and a drastic revision in

[2] The decision also urges that the corporation's legal entity and corporate obligations will remain unchanged, but this is likely to be the case in *any* transfer of corporate control.

corporate operating policy is proposed — the complete dissolution of the company.

Since the principal effect of the "modified 316" procedures adopted by the majority would be elimination of the opportunity for formal public comment, it is particularly important to note that the lack of change in ownership does not support limiting public involvement. Thus, the classification adopted by the majority does not further the purposes of Section 309 as required by subsection 309(g).

Third, the majority's desire not to frustrate corporate law or shareholder rights does not provide any basis for avoiding the Section 309 procedures. No conflict with corporate law has been shown to flow from following the full statutory procedures, and the Commission cannot invoke a policy goal that is not even referenced in the Communications Act to support its departure from the express congressional directions contained in Sections 309(b) and 309(d).

Further, there is no record here to support a finding that compliance with the statutory procedures would impose a burden on the exercise of shareholders' voting rights. The appropriate means to reconcile the majority's policy goal of neutrality with the Communications Act procedures would be to grant highly expedited consideration to a long-form application. The Committee itself states that proxy fights customarily are announced up to eight weeks in advance of the shareholders' meeting (Opposition to Application for Review, at 25-26), and it would not be unreasonable to expect that the Commission could complete its review of a long-form application on a roughly equivalent timetable. Should the Committee nevertheless regard the statutory holding period as excessively burdensome, it has the option of following the procedure described by the Media Access Project — seeking Commission approval *after* the shareholder meeting but before its directors would actually take their seats. *See* Media Access Project, Comments in Support of Application for Review.

Finally, there is an independent basis for concluding that the Committee's proposed transfer is "substantial" under the meaning of the Act. The one matter on which all the members of the Commission agree is that a Notice of Inquiry is necessary to explore the important issues surrounding this type of transfer. This case presents novel questions, and the answers adopted by the Commission will have a significant impact on the entire broadcast industry.

While I do not dispute the Commission's ability to act in an adjudicatory context, it also should seek to encourage public participation on issues of broad impact. At a minimum that should include providing an opportunity for formal public participation here unless there is a compelling reason not to permit such participation. Here, the only reason not to permit

comment appears to be the Commission's concern that delay might hinder the Committee's efforts at the May 7 shareholder meeting. Given that the Committee controlled when its application would be filed, it is particularly unreasonable to rely on the need for speedy resolution as a basis for precluding formal participation by interested persons.

Conclusion

I do not believe there is any sound basis for the Commission to depart from the procedures set out by Congress in Section 309, and I see strong reasons for permitting formal comment in this novel situation. Accordingly, I must dissent from the conclusion that the proposed transfer of control is not a "substantial" transfer under Section 309 of the Act.

Re: Application of the Committee for Full Value of Storer Communications, Inc. File No. BTCCT-850319KQ, *et. seq.*

STATEMENT OF
COMMISSIONER MIMI WEYFORTH DAWSON
DISSENTING IN PART AND CONCURRING IN PART

I dissent to the Commission majority's decision in this case to the extent that it finds that a transfer of control, of one kind or another,[1] would occur if the Board of Directors of Storer Communications, Inc. ("Storer") is replaced by means of a shareholder proxy contest. However, clearly a majority is willing to find that some form of transfer would occur. In light of this, I certainly agree that no "long-form" application is necessary, and I see no reason why the Commission would require anything other than an Ownership Report (Form 323) to report changes in a board of directors. Even so, since a majority has found some kind of "transfer," I am willing to concur in the "short-form" procedure, as outlined in the majority decision, to report "insubstantial" transfers of control.

On the facts before the Commission, I believe that Storer has not met what I believe to be its burden of proving its claim that *de facto* control now lies in a person or group other than its shareholders. Accordingly, I believe the Commission would be well within its discretion to find that Storer's shareholders control the corporation and that a proxy contest among those shareholders involves no transfer of control.

It is well established as a general rule of corporate governance that shareholders "control" their own corporations.[2] Yet, in this case the

[1] The finding of a transfer occurs in this case only on the barest of majorities. Only two Commissioners would find a *de facto* transfer while one Commissioner would find a transfer of a "cognizable interest."

[2] As one authority has put it, in "the absence of a provision to the contrary in the charter of the corporation or the general law, the management and control of the corporation is vested primarily in the stockholders or members collectively as constituting the

Commission need not rely on such general propositions of law. In 1976, upon the death of George Storer and the disbursement of his stock, Storer's Vice President and Washington counsel *informed* the Commission, on behalf of Storer, that *de facto* control had passed from George Storer to the "general public," presumably the corporation's shareholders. *Opposition to Application for Review*, Exhibit B. This was so even though the same letter indicated that the "management" of the corporation had garnered enough proxies to insure the redemption of Mr. Storer's stock at a special shareholders meeting. *Id.*[3] This appears to be Storer's last representation to the Commission regarding Storer's ownership until the present proxy fight.

Now, Storer claims *de facto* control rests elsewhere. Given Storer's obvious change of position between 1976 and today as well as the ultimate authority of Storer's shareholders to "control" the corporation, I believe Storer bears a substantial burden of demonstrating that a shift in control has occurred.[4] The question for Commission resolution then becomes whether Storer has met its burden of proving that control now rests in some person or group and not in the shareholders generally, as it previously represented. I believe that Storer has not met that burden. Indeed, in reviewing the majority decision and the accompanying separate statements, it appears that a majority is likewise unable to agree that Storer has been able to demonstrate that *de facto* control lies in its board or "management group."

Illustrative of its inability to show a shift in *de facto* control is Storer's remarkable inability to answer the most basic question of who is in *de facto* control of the corporation. Storer's pleadings in this case seem to present several different views on this question. In its original pleadings in this case, Storer argues that despite its representation to the Commis-

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corporation, and in them alone." 5 *Fletcher Cyclopedia Corporations*, Ch. 15, Section 2097 at 399.

[3] Storer's view of the transfer of control in 1976 could hardly be more inconsistent with its current view of such "transfers." Then, Storer, even though admitting that a *de facto* transfer had occurred, apparently viewed an Ownership Report as sufficient to report the transfer. *Opposition to Application for Review*, Exhibit B. Now, however, Storer argues that a Form 315 is necessary to effectuate such a *de facto* transfer of control.

[4] Under Commission rules, the licensee is responsible for informing the Commission if there has been a shift of *de facto* control. It follows that if the corporation contests the Commission's determination of the locus of control based on the corporation's filing, the corporation has the burden of showing control rests elsewhere. In addition, the Commission and the courts have consistently recognized that the ascertainment of control is a factual question turning on the " 'special circumstances presented.' " Lorain Journal Co. v. Federal Communications Comm'n, 351 F.2d 824, 829 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966), *citing* Town and Country Radio, Inc., 15 Rad. Reg. 2d (P&F) 1035, 1037 (1960). *See also* Rochester Telephone Co. v. United States, 307 U.S. 125, 145-46 (1938).

sion in 1976, a "management group," which "includes" the nine-member board of directors as well as the officers and "management" of the corporation, somehow came into *de facto* control between 1976 and the present. *E.g., Petition for Dismissal of Application* at 3. However, in a later pleading, Storer appears to identify the actual "management" of the corporation as a triumvirate of directors — the composition of which has changed over the past three years — which is in *de facto* control of the corporation because this shifting triumvirate has voted a large majority of shareholder proxies over the last three years.[5] *Storer Reply to Opposition* at 4. Given this inconsistency in representations to the Commission, it is virtually impossible to identify some person or group that can be said to be in *de facto* control of the corporation.

Thus, this case stands in sharp contrast to *Metromedia, Inc.*, 98 F.C.C.2d 300, *recon. denied*, 56 Rad. Reg.2d (P&F) 1198 (1984), *appeal docketed sub nom. California Association of the Physically Handicapped v. Federal Communications Commission*, No. 84-1170. (D.C. Cir., filed May 4, 1984). There, the licensee made a substantial factual showing identifying one person, John Kluge, as having been in *de facto* control of Metromedia by virtue of his large stock ownership (26 per cent), his ability to elect directors, and the corporate offices he had held over nearly two decades. Storer has made no such clear demonstration. Moreover, as far as the record shows, Metromedia, unlike Storer, had made no prior inconsistent representations to the Commission with regard to the locus of control.

Rather than demonstrating as a matter of fact that some individual or group is in control, Storer seeks to have the Commission determine that, as a matter of law, some "management group" of a corporation is always in control for Section 310 purposes. Not only is this inconsistent with Storer's view of the law in 1976, but I believe that, consistent with the Communications Act, the Commission should remain neutral in intracorporate disputes and that as a normal matter of construction, we must read the Act in a manner broad enough to accomplish its purposes, but not so broadly that it unnecessarily conflicts with other laws - notably, in this case, general corporations law.

Certainly, I recognize that the board of directors of a widely held, publicly traded corporation exercises a great deal of operational and managerial authority. Nonetheless, for purposes of Section 310, I cannot conclude that a board in all cases exercises control to the extent that a change in a board would necessarily result in a transfer of control.

[5] Storer refers to proxies voted by the triumvirate as being "cast by management" and says that only those directors "recommended by management" have elected. *Storer Reply to Opposition* at 4.

I believe that such a reading of Section 310 would conflict with well-settled rights of shareholders under corporations law to conduct a proxy contest or otherwise exercise their rights to vote for directors. Section 310 provides an opportunity for the Commission to grant assignments of licenses in the public interest. Recognizing that corporations could be Commission licensees, Section 310 provides that transfers of control of a corporation holding a license could constitute an indirect assignment of the license. But neither the statute itself nor the legislative history provides any explanation of what constitutes a transfer of control for purposes of the Section 310. This task has been left to the Commission, which over the years, on a case-by-case basis has considered the boundaries of its authority to consider changes in corporate licensees.

The purposes of Section 310 are clear: under the statute we need an application if there is an assignment of a station to gather facts about the new licensee's "citizenship, character, and financial, technical, and other qualifications. . .to operate the station." 47 U.S.C. 308(b). In the instant case some of the Storer shareholders are undertaking a proxy contest, which is a procedure sanctioned by corporations law to allow the exercise of shareholder control. The present Storer board has voted not to follow the direction urged by The Committee for Full Value of Storer. The Committee has chosen to propose a new slate of directors to replace the slate up for election in the normal course of the annual shareholder meeting. An overbroad reading of Section 310 would be discordant with the corporations law principles which allow such a contest to occur in the course of corporate governance.

Similarly, such a broad reading of Section 310 would necessarily thrust the Commission into corporate governance on the side of existing management. I believe that the Commission should remain as neutral as possible in an intracorporate dispute such as the one in this case. That is, the procedures outlined in the Communications Act should be used neither as a sword to promote dissident shareholders nor as a shield to protect entrenched management. Thus, to the extent possible, I believe that licensees of this Commission should be placed on the same footing as any other corporation.

Finally, while I believe that no transfer of control — *de facto*, cognizable or otherwise — has been demonstrated on the facts of this case, I am nonetheless confronted with a majority which has found a Section 310 transfer of control, and I am necessarily drawn into the question of what procedure should be used in such a case. As I indicated above, I see no reason why an Ownership Report (Form 323) could not be used. However, since a majority has found that the election of a new Storer board constitutes a transfer of some kind of interest cognizable

under Section 310, I will concur with the use of a "modified short form" as outlined in the Commission decision.

STATEMENT OF COMMISSIONER HENRY M. RIVERA CONCURRING IN PART, DISSENTING IN PART

RE: Memorandum Opinion and Order in Re The Committee for Full Value of Storer Communications, Inc.

I am not interested in making this agency a shield for incumbent management to use against insurgent stockholders. However, Congress, in its wisdom, has determined that broadcasting is not just another business. Therefore, it requires this Commission to make public interest findings any time control of a broadcast entity changes hands and to permit the public to participate in this process. Congress created certain limited exceptions to the rules providing for public involvement. Among the excepted types of applications are those involving insubstantial transfers of control.

The issues here are: (1) whether the ouster of Storer's board of directors as proposed by the Committee for Full Value of Storer Communications, Inc. ("Committee") is a transfer of control; and (2) is so, whether it is a substantial transfer. I concur in the *Memorandum*'s finding that what the Committee proposes is a transfer of control.[1] I dissent, however, from the *Memorandum*'s conclusion that the transfer is insubstantial and, therefore, that the public can be excluded from the examination process.[2] Logic, the facts and precedent are to the contrary. If the Committee's efforts are successful, a substantial change in control of Storer will plainly result. The public is entitled to notice and the chance to comment on this change. Because of the need for expedition, I will state my views briefly, rather than engaging in a point-by-point review of the *Memorandum* or other Commissioners' separate statements.

The statutory analysis is straightforward. Section 310(d) of the Act says that the FCC must approve a transfer of control of a broadcast license before the transfer occurs. Sections 308 and 309 set out the rules that govern such applications. As indicated above, Sections 309(b) and (d) generally provide for public involvement in the application process, with narrow exceptions. Section 309(c)(2)(B) contains an exception for transfers

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[1] *See* paragraph 24.

[2] *See* paragraphs 26-31. Necessarily, I disagree with the positions espoused by the dissenting Commissioners who are prepared to accept some form of FCC review in this case solely to provide a majority for that part of the *Memorandum*.

that do not involve a substantial change in ownership or control of a license. The *Memorandum* relies on this exception to avoid extended review in this case.

The legislative history of Section 309(c)(2)(B) makes clear just how narrow the exception was intended to be. The testimony of Ernest W. Jennes, Esq., a key drafter of Section 309(c)(2)(B), indicates that only a "very limited type of transfer" of ownership or control is within the purview of Section 309(c)(2)(B): "the incorporation of a partnership where the partnership transfers its license to the new corporation, and the transfer of stock of a corporate licensee to the estate of a decreased sole stockholder under the laws of descent and distribution."[3] In the words of Mr. Jennes: "There are two types of situations which would be excluded by that proviso. Involuntary transfers and *pro forma* transfers. Everything else is covered."[4]

The *Memorandum* does not argue that this potential transfer of control is either an involuntary transfer or a *pro forma* transfer. Instead, the *Memorandum* propounds a novel theory. Under its theory, Storer's board of directors wields control of the corporation, but only the shareholders exercise "ultimate" legal control. Therefore, it is only when a majority of Storer's stock changes hands that a substantial transfer of control would occur.[5] And under the view espoused in the *Memorandum*, this is the primary situation in which the public right to participate is intended to vest.[6]

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[3] *See* Testimony of Ernest W. Jennes, Esq., on behalf of Federal Communications Bar Association on 1960 *Communications Act Amendments* before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 2d Sess., April 12, 1960, at 133.

[4] *Id.* The House Report accompanying the legislation reinforces this view. It states that the exceptions contained in Section 309(c) "deal with situations where the matters considered are of such minor concern and where the 30-day waiting period and the filing of a petition to deny would serve no useful purpose." *Report on Communications Act Amendments*, H.R. Rep. No. 1800, 86th Cong., 2d Sess., *reprinted in* One Star Volume R.R. p. 10:416 (1960).

[5] That rule is not always followed, however. In *Metromedia, Inc.*, the FCC classified a transfer of more than 50 percent of the company's stock as an insubstantial transfer of ownership because John Kluge was retaining control. *See* 98 FCC 2d 300 (1984) and Concurring Statement of Commissioner Henry M. Rivera, *id.* at 306 (objecting to statutory interpretation). Thus, *Metromedia* held that a change in the ownership of most of a company's stock is an insubstantial transaction for FCC purposes as long as there is no change in corporate control. Here, the majority holds a profound change in corporate control is an insubstantial transaction for FCC purposes if a majority of the company's stock ownership remains the same. The path taken by the Commission in recent ownership/control interpretations seems result oriented, to say the least.

[6] The *Memorandum* notes that the public is also entitled to participate when there is a change in *de facto* control of a corporation, provided the change is accompanied by a stock transfer. *see* paras. 21-22 and n. 3. The basis for the latter requirement is unclear.

In my view, the exception for insubstantial transfers of control cannot be applied to this case. Initially, Congress intended the exception to be narrowly construed. The construction advanced by the *Memorandum* could place numerous transfers of corporate control entirely beyond the reach of Sections 309(b) and (d). Nothing advanced convinces me that Congress intended so large a loophole to the basic scheme of Title III. Furthermore, the *Memorandum* has mischaracterized the type of control exercised by shareholders of a corporation. A corporation is controlled by its board of directors; the law carefully circumscribes shareholder control. As stated in *Fletcher's Clyclopedia*:

> As a matter of fact, under our present laws and practice, the powers of management vesting in the stockholders as a body are very few. They control the affairs of a corporation, while it exists and does business, in proportion to the number of their shares, through the officers elected by them. They have the right and power to hold meetings, elect directors and sometimes other officers, remove directors at will under some statutes, and in some jurisdictions to make or alter bylaws and increase or decrease the capital stock, amend the articles or charter and change the powers and purposes of the corporation, authorize the dissolution of the corporation, or determine upon other organic or fundamental changes. In one of the leading cases, the court said: "*The directors are constituted managers of the corporate affairs. They determine the corporate policies, they elect the corporate officers. In the functioning of the corporate machinery the power of control of the holders of the majority stock as is in such matters, exhausted with the election of the directors.*[7]

Thus, there is general agreement that the board of directors presumptively controls a widely held corporation. The facts presented here do not rebut that presumption. Therefore, it is difficult to see how replacing Storer's entire board can be anything but a substantial transfer of control,[8] especially given Congress' expansive intent with regard to Section 309's procedural rights. I have difficulty with the *Memorandum*'s logic that replacing Storer's board would be transfer of control within the meaning of Section 310(d),[9] but only an insubstantial transfer. This proposed change in corporate control could not possibly be more substantial — Storer's entire board would be replaced, giving rise to the probability that the policies governing the operation of the company

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[7] *See Fletcher's Cyclopedia of Corporations*, Section 2097, at 400-01 (1976) (stockholder's power) (citing *McQuade* v. *Stoneharm*, 263 N.Y. 323, 198 N.E. 234, 238).

[8] The Commission said as much in *Teleprompter*: "The election of the new Board of Directors constitutes a transfer of control of the corporation and requires prior Commission approval . . . " 40 FCC 2d 1027, 1029 (1973). The *Memorandum*'s attempt to confine that case to its facts is unpersuasive. The decisional point in *Teleprompter* was that the company's entire board changed — not, as is suggested, that there was a dispute between minority stockholders in contention for *de facto* control. *Teleprompter* found a Section 310(d) substantial transfer and I believe its logic squarely applies to this case.

[9] "We believe that Storer's Board has a sufficient degree of corporate control such that an abrupt change of the entire Board under these circumstances requires approval under Section 310." *Memorandum*, at paragraph 24.

would change. The fact that Storer's shareholders retain certain carefully circumscribed powers and that the legal entity would remain the same seem essentially beside the point at issue.

In their desire to step aside in this corporate dispute, my colleagues abrogate a basic tenet of Title III — public involvement in broadcast licensing. I believe there are ways that the Commission can avoid serving as a guardian for incumbent management while, at the same time, complying with the Communications Act. Although the FCC cannot ignore its legal duties, we do not have a measure of discretion to implement the law in a way that is not contrary to the public interest. In this case, if the Commission required the Committee to run the procedural course specified for substantial transfers of control before it could take control of Storer, the Commission could erect a significant impediment to the proxy proposal. For if we required the Committee to resolve all petitions to deny before bidding for control, that process could take months or longer, dissuading all but most ardent suitor from going forward. Alternatively, if the FCC said that it was unnecessary for the Committee to comply with Section 309 before the proxy fight, as long as it did so before taking control of Storer's board, Storer and its licensed stations could be put in a state of chaos because of the uncertain management situation during the time between the shareholders' vote and the completion of the long form review process (*i.e.* the company could have a new board for corporate purposes and a lame duck board for FCC purposes). The net effect of either procedural approach could be to provide significant insulation to Storer's management from shareholders' oversight.

Nothing in the legislative history cited to us by the parties suggests that Congress wanted the FCC to act as a shield for incumbent management. From a public interest perspective, moreover, there is nothing apparent at this stage that seems inherently wrong with the Committee's qualifications or plan. The challenge is to see if we can minimize the potential dampening impact of the Communications Act upon the exercise of corporate democracy while preserving the public's essential statutory right to participate in the transfer application review process.[10] The following two-step procedure is a possible solution. First, the Commission could do a bare bones review of the Committee's qualifications before the proxy fight is initiated, along the lines suggested by the *Memorandum*. The object would be to grant the Committee, under Section 309(f), a special or temporary authorization to succeed the incumbent board immediately upon the successful conclusion of its proxy

[10] Unlike *Metromedia, Inc., supra*, where there was no reason to deviate in any respect from the procedure called for by the statute, the public interest would be served by doing so here for the reasons outlined in text.

fight.[11] The second review phase would take place after the new board was elected in order to decide if the Section 309(f) conditional authorization should become permanent. Public notice would be given so that interested parties could exercise their right to examine the new board's qualifications fully. In the event of a problem, the Commission could order remedial action.[12] Otherwise, the transfer would be approved.

One could argue that this procedure would effectively prohibit the Committee from carrying out its stated purpose — liquidation of the company. I disagree. All contracts for liquidation of the corporation could be contingent upon the FCC's final approval of the Committee. Also, liquidation of a large publicly-held corporation is not accomplished overnight. An FCC committed to processing the Committee's application expeditiously would be unlikely to impede orderly liquidation of the corporation. In addition, the Committee itself has conceded that it would be practical to comply with Section 309(b), as long as it can do so after the proxy fight.[13] For these reasons, I am not convinced that the modified short-form procedure specified in the *Memorandum Opinion* is necessary in this case, even if it is legal. The procedure I have outlined seems preferable — it gives the Committee adequate breathing room to wage a proxy fight, but in a way that better meets the Communications Act's command that the public be notified and given the chance to participate in the licensing process.

This is a difficult case, requiring us to balance sensitive, potentially conflicting interests. In its efforts to allow corporate democracy to work its will freely, and effort I support, I fear the Commission has violated a cardinal requirement of its enabling statute. I, therefore, respectfully dissent from the failure to require compliance with Sections 309(b) and (d) of the Act.

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[11] 47 U.S.C. Section 309(f) provides: "When an application subject to subsection (b) has been filed, the Commission, notwithstanding the requirements of such subsection may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary authorizations would seriously prejudice the public interest, grant a temporary authorization. . . ." Thus, the section specifically allows us to postpone public notice and participation when the public interest requires it.

[12] I am sensitive to the fact that any such action could be disruptive for the company. However, the risk of it is not high and is one that must be borne in order to comply with the Communications Act. In this situation, disruption is also possible in the event of successful securities litigation by an interested party.

[13] *See* Opposition to Application for Review, filed April 5, 1985, at 24 ("If long-form review were required or desirable, it would be plainly a more efficient and effective deployment of the Commission's limited resources to conduct it after the election, when the results are known, than before, when it is impossible to know if the challengers will even be seated".)

Frequency Equitable Distribution of Under 307 (B)

Smaller community lacking its own transmission service selected under Section 307(b) issue over larger community which already had its own local station. The winning community was of sufficient size to warrant its own local outlet.
—*Sunshine Broadcasting, Inc.*
MM Docket No. 83-1332

FCC 85R-52

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Sunshine Broadcasting, Inc. Fort Myers Villas, Florida	MM Docket No. 83-1332 File No. BPH-820825BY
L.B.C., Inc. Cape Coral, Florida	MM Docket No. 83-1334 File No. BPH-820824 AI
For a Construction Permit for a New FM Broadcast Station	

Appearances

David Tillotson, Peter Tannenwald and *Lisa C. Ward* on behalf of Sunshine Broadcasting, Inc.; *Alfred C. Cordon* and *Dennis J. Kelly* on behalf of L.B.C., Inc.

DECISION

Adopted: June 18, 1985 Released: June 26, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. In earlier rulemaking proceedings a local, low power, Class A FM radio channel (292A) was assigned to Cape Coral, Florida. However, the Commission specifically ruled that the channel could also be applied for in

nearby Fort Myers Villas, Para. 3 below. After a trial type comparative hearing, Administrative Law Judge Coufal (ALJ) concluded that Section 307(b) considerations favored a grant to the smaller Fort Myers Villas community, which does not have its own local station, over the larger community of Cape Coral which already has its own local station. Initial Decision (I.D.), FCC 84D-80, November 30, 1984. LBC, Inc., the unsuccessful applicant for Cape Coral, has filed a full brief and exceptions containing some 19 separate points. In both its written brief and at oral argument on April 3, 1985, LBC invited the Board to conduct its own review of the record and based on the proposed findings make its own *de novo* findings and conclusions. After closely scrutinizing the arguments, especially on the Section 307(b) and related issues, we conclude that the ALJ's findings do accurately reflect the record and affirm his ultimate selection of Fort Myers Villas as consistent with the Commission and Court precedents discussed below.

2. LBC's brief meanders in many different directions but its major contentions can be summarized as follows: (a) Fort Myers Villas is not a community for Section 307(b) purposes and the presiding officer erred in giving Fort Myers Villas a community preference over Cape Coral; (b) Sunshine Broadcasting, the successful applicant, "breached a commitment made to the Commission at the rulemaking for Channel 292A to apply for and construct the station at Cape Coral" and the ALJ erred in concluding that Sunshine had not misrepresented its intention to the Commission; (c) for this and other reasons the Sunshine applicant does not possess the required character qualifications to be a broadcast licensee.

3. *Background:* All applicants received notice at the beginning of these comparative proceedings that while the channel was assigned to Cape Coral it could also be applied for in Fort Myers Villas. This fact had been clearly set out by the Commission's staff in the prior rulemaking proceedings. I.D., paras. 7, 10. And counsel for LBC acknowledged that its applicant, like Sunshine, could have amended its application to specify Fort Myers Villas but chose not to do so "because we felt that Cape Coral was a better community." Oral Argument Tr. 1054-1055.

4. The record also establishes that throughout the rulemaking proceedings Sunshine Broadcasting had tried to persuade the Commission to assign the channel to Cape Coral. I.D. paras. 4, 6. But at the end of those proceedings the Commission concluded that Fort Myers Villas was a community, and was also eligible for the local class A channel. I.D. paras. 7-10. Thereafter, Sunshine amended its Cape Coral application to specify Fort Myers Villas. I.D. para. 11. When questioned by the Board about this "about-face," I.D. para. 53, counsel for Sunshine responded that his client:

> had a great deal of time and effort invested because he wanted a radio station in that area, looked at it, consulted with counsel, understood the 307(b) cases and assumed,

> as any rational person would, that someone was going to file for that community [Fort Myers Villas] and was going to get the 307(b) preference. (Tr. 1074-1075)

5. *Misrepresentation and Estoppel:* LBC continues to urge that Sunshine should be disqualified on character grounds for breaching its representations to the Commission during the rulemaking proceedings that it would construct and operate a station in Cape Coral. LBC Br. 36-41. The ALJ's findings, paras. 4-11, and conclusions, paras. 50-54, on this point accurately reflect the record and are hereby affirmed. In essence, Sunshine was not estopped from amending to a different community because of its earlier position in the rulemaking proceeding. The basic facts in this case differ from those in *Beaufort Broadcasting Co.*, 94 FCC 2d 572 (Rev. Bd. 1983) because here Sunshine's amendment took place prior to designation for hearing and therefore did not require good cause. Moreover, the amendment took place shortly after the Bureau announced that Channel 292A could also be used in Fort Myers Villas, which was found to be a community for Section 307(b) purposes. See I.D. paras. 7, 10, and *FM Channel Assignments*, 52 RR 2d 571 (Bureau 1982). To the extent that LBC continues to press its misrepresentation and estoppel arguments it detracts attention from its principal issue: whether Fort Myers Villas is the type of community which is entitled to its own local station.

6. *The Community Question:* In designating this case for hearing the Bureau denied a motion to dismiss Sunshine's application which was based on the claim that Fort Myers Villas did not qualify as a community. It pointed to its earlier ruling during the rulemaking proceedings that Fort Myers Villas was a community within the meaning of Section 307(b) and noted that this determination was "based upon information provided by both the Fort Myers Chamber of Commerce and the Fort Myers Villas Civic Association," Hearing Designation Order, MM 1346, December 23, 1982, para. 32. The ALJ followed this ruling and refused to add the "community" issue as a basic qualification matter, FCC 84M-1546, released March 19, 1984; however, pursuant to the previously designated Section 307(b) issue regarding the relative needs of Cape Coral and Fort Myers Villas for a new FM station, he permitted the parties to fully explore the matter. Thus, LBC argues that under the Section 307(b) issues specified in the case, voluminous evidence was adduced demonstrating that Fort Myers Villas is not a community. . . ." (LBC Br. 1-2, 20-30). Sunshine responds that "there is an overwhelming amount of evidence in the record regarding the essential characteristics of Fort Myers Villas" set out in the ALJ's findings, para. 24-34, supporting his award of a Section 307(b) preference to that community. (Sunshine Br. 16-24).

7. Recently, the Board fully reviewed those factors which must be considered in deciding whether a community is entitled to a Section 307(b)

preference. *See Debra D. Carrigan*, 58 RR 2d 96, *recon. denied*, 58 RR 2d 111 (Rev. Bd. 1985); *see also Voce Intersectario Verdad America, Inc.*, FCC 85R-44, released May 30, 1985. That analysis begins with the nature of the radio facility and its proposed coverage. Here a low power local channel is involved instead of a higher power regional channel. Neither Cape Coral nor Fort Myers Villas is a suburb of the other; both are part of the same metropolitan statistical area, but neither applicant would provide service to the entire metropolitan area. These factors point in the direction of a Section 307(b) community choice, if the other traditional factors also tend to establish that Fort Myers Villas qualifies as a community which is entitled to its own local radio station. See para. 9 below.

8. LBC's reliance on *Hispanic Owners*, 57 RR 2d 699 (Rev. Bd. 1985) is misplaced because that case involved a high power regional channel which provided service to the entire urbanized area whereas the present case does not contain those factors. *See also Caldwell Broadcasting Corp.*, 57 RR 2d 1039, 1042 para. 4. (Rev. Bd. 1985). Likewise its reliance on *Ruarch Associates*, 56 RR 2d 1593 (Rev. Bd. 1984), and *Santee Cooper Broadcasting Co.*, 57 RR 2d 662 (Rev. Bd. 1985), does not advance its argument. Both of those cases involved the "Quiet Village Model," *Debra D. Carrigan, supra*, 58 RR 2d at 104, tiny communities with populations of less than 1000. Here the population of Fort Myers Villas was some 3,500 in 1970 and had grown to 8,724 in the 1980 Census, I.D., paras. 24, 26. Moreover, the local county planning officials have projected a population growth of 264-433% for the period 1980 to 2005, I.D. para. 33, hardly a "Quiet Village."

9. Another factor which points toward a 307(b) selection is the recognition of Fort Myers Villas as a particular place in both the 1970 and 1980 Census, and by the Bureau in the rulemaking proceedings. *See generally FM Assignment Policies and Procedures*, 51 RR 2d 807, 816 (1982). But recognition of a particular place by the Census Bureau, standing alone, is not always sufficient, *FM Channel Assignment (North Naples, Florida)*, 41 RR 2d 1549, 1553-54 (Bureau 1977). An applicant must also establish other attributes or indicia of community such as the presence of political, commercial, social, or religious organizations; and whether "the residents function as and conceive of themselves as a community around which their interests coalesce." *FM Assignments (Vimville, Mississippi)*, 55 RR 2d 256, 258 (MMB 1983). The Commission has cautioned against imposing "too stringent burden of proof upon applicants" and has noted "existing precedents which in general require less definitive proof as to the community status of the station location for which application is made, " *Seven Locks Broadcasting Co.*, 37 FCC 82, 83, and note 1 (1964). Accordingly, reliance has been placed on both

subjective indicia and more objective "demographic" and "economic" factors. See generally *Mighty-Mac Broadcasting Co.*, FCC 85R-53, adopted June 20, 1985, paras. 5-7.

10. In the rulemaking proceedings the Bureau requested additional information before concluding that Fort Myers Villas was "a separate and identifiable community" in need of its own local station. That demographic and economic information established that the community had a population of 3,500, had "a fire department/ambulance service and civic center" as well as "a variety of shopping centers, restaurants, banks and other community services." *FM Assignments Channel, supra*, 52 RR 2d at 571. In the present hearing the ALJ gave the parties a full opportunity to develop the facts regarding the needs of the two communities, and his Initial Decision contains some twenty paragraphs of traditional findings regarding Cape Coral, I.D. paras. 13-23, and Fort Myers Villas, paras. 24-34.

11. LBC does not dispute the existence of the community of "Fort Myers Villas" for which Sunshine applied but claims that it contains a much smaller area and encompasses only 3,038 persons (Br. 28), when contrasted with the larger area which the 1980 Census identified as "Villas" with a population of 8,724 persons. LBC's contentions were reviewed by the ALJ who compared the map submitted by Sunshine to show the boundaries of its proposed community of license (Sunshine Ex. 6, p. 1-3) with the map showing the area identified by the Census Bureau as "Villas" (Sunshine Ex. 5, p. 29), and found that "it is clear that the boundaries of what Sunshine calls 'Fort Myers Villas' coincided with the boundaries of the [1980 Census] Villas . . . " I.D. para. 24, note 6. We affirm this finding and the ALJ's additional findings that: "In the 1980 Census, the Census Bureau adopted a new term, 'census designated place,' for communities such as Fort Myers Villas, and the Census Bureau shortened the name of the community to Villas.' Under common usage, the community is referred to locally as either 'Fort Myers Villas' or 'Villas.' Tr. 119, 139-140; LBC Ex. 16, p. 11. Fort Myers Villas was the designation used by the Commission in the rulemaking proceeding. I.D. at note 6.

12. The record supports the ALJ's findings which establish, contrary to LBC's contention, that this is not a case in which an applicant has used his own subjective concept of community to include "a nebulous mass of unspecified territory" or artificially incorporate "a conglomerate of communities." *See, e.g., Jupiter Associates, Inc.* v.*FCC*, 420 F.2d 108 (D.C. Cir. 1969), and *Five Cities Broadcasting Co.*, 35 FCC 501 (1963). Here Sunshine specified as its community of license the particular area and community which had already been identified by both the Census Bureau, and the Commission's staff in the rulemaking proceedings. We

therefore affirm the ALJ's conclusion that Section 307(b) considerations favor the community applied for by Sunshine even though "Cape Coral is more populous by four times and has a municipal government while Fort Myers Villas has none." I.D. para. 55. Of critical or decisional significance is the fact that Cape Coral already has its own local radio station and Fort Myers Villas has none. Accordingly, under established Commission policy the Section 307(b) issue is dispositive here. *See WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132 (D.C. Cir. 1985.); *see also Service Broadcasting Corp.*, 36 FCC 1085 (Rev. Bd. 1964), where the Board held that Zion, Illinois with a population of 11,941 needed its first local outlet more than Kenosha, Wisconsin, population 67,899, needed its second competing local station.

13. *Other Matters:* At the hearing LBC urged that Sunshine was not basically qualified because of its alleged misrepresentations during the rulemaking proceeding, para 5 above. It also claimed that Sunshine had misrepresented facts regarding its transmitter site and impact statement. We have reviewed *several* ALJ rulings concerning these allegations and agree with his resolution of the issues. *See* FCC 84M-1545 and 1547, released March 29, 1984; FCC 84M-2622, released June 11, 1984; FCC 84M-2679, released June 13, 1984; FCC 84M-3266 and 3267, released July 25, 1984.

14. On March 4, 1985, LBC filed with the Board a motion to enlarge the issues and reopen the record. LBC alleged that in another case involving Vero Beach, Florida, Jerald M. Bellairs, a principal in Sunshine, "aided and abetted Patricia L. Bellairs [his sister] in falsely certifying her application at Vero Beach, Florida." We have reviewed LBC's allegations, Jerald Bellairs' statement submitted under penalty of perjury, and the relevant documents from the Vero Beach proceeding which have been filed with the Board. LBC has failed to justify reopening of the record on a basic qualification issue. On the contrary, the showing before us indicates that Mr. Bellairs, who is a technical consultant, prepared the engineering portion of his sister's application for Vero Beach. Mr. Bellairs states that on February 27, 1984, he and his sister had "a 62-minute phone call where they discussed, point by point, each question in the engineering section and the exhibits" to the Vero Beach application. His sister signed and dated the general application March 1, 1984. Although Bellairs had completed the engineering on February 27, he did not finish typing and making copies until March 5, 1984, the date he certified the engineering portion of the application. It is significant that the documents before us which had earlier been filed with the Commission establish that the sister certified the entire application on March 1, and that the brother certified the engineering portion of the application on March 5. There was no attempt to conceal or misrepresent the different certification dates from

the Commission. LBC has once again failed to justify its misrepresentation charge in this proceeding. At most this matter might call for a comparative demerit, *Cf. Broadcast Associates of Colorado*, FCC 85R-25, March 19, 1985. Such a demerit would not be decisive in this Section 307(b) case.*

15. ACCORDINGLY, IT IS ORDERED, That the Motion to Enlarge Issues and to Reopen the Record, filed March 4, 1985, by LBC, Inc. IS DENIED; That the application of LBC, Inc., IS DENIED, and that the application of Sunshine Broadcasting, Inc., File No. BPH-820825BY, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

* Our ruling is confined to the specific record and charge before us that Bellairs allegedly aided and abetted; we express no opinion on the issues being tried by the ALJ in the Vero Beach proceeding.

FCC 84D-80

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Sunshine Broadcasting, Inc. Fort Myers Villas, Florida	MM Docket No. 83-1332 File No. BPH-820825BY
L.B.C., Inc. Cape Coral, Florida	MM Docket No. 83-1334 File No. BPH-820824 AI
For a Construction Permit for a New FM Broadcast Station	

Appearances

David Tillotson, Peter Tannenwald and Lisa C. Ward on behalf of Sunshine Broadcasting, Inc.; Alfred C. Cordon and Dennis J. Kelly on behalf of L.B.C., Inc.; and Stephen T. Yelverton and Paulette Laden on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERIC J. COUFAL

Issued: November 28, 1984; Released: November 30, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Sunshine Broadcasting, Inc. (Sunshine) and L.B.C., Inc. (LBC) for a construction permit for a new FM station to operate on Channel 292A. The LBC application is for Cape Coral and Sunshine seeks a permit for Fort Myers Villas, Florida.[1] On December 23, 1983, the Commission released a

[1] Originally four other applicants were involved in this proceeding: Affirmative Broadcasting Company, Inc. (MM Docket No. 83-1333), Todd Stuart Noordyk (MM Docket No. 83-1335), Skinner Broadcasting Company (MM Docket No. 83-1336), and Richard Deem Rahall, d/b/a RDR Broadcasting Company (MM Docket No. 83-1337) were dismissed with prejudice. On July 25, 1984, the applications of Todd Stuart Noordyk and RDR Broadcasting were dismissed with prejudice. *Order*, FCC 84M-3260, and Order, 84M-3464.

Hearing Designation Order designating the applications of Sunshine and LBC for a hearing on the following issues:

a. To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.

b. To determine, in the event that it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

c. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

On March 29, 1984, the issues in the proceeding were enlarged to include the following:

To determine whether Sunshine Broadcasting, Inc., made material misrepresentations to the Commission in BC Docket No. 81-565 and, if so, the effect thereof upon its basic and/or comparative qualifications to be a Commission licensee.

Memorandum Opinion and Order, FCC 84M-1547.[2]

2. Prehearing conferences were held on February 27, 1984, and June 21, 1984. An evidentiary hearing was held in Washington, D.C., from June 25 through June 29, 1984.

Findings of Fact

3. In the findings of fact that follow, the misrepresentation issue will first be addressed, followed by the Section 307(b) issue, and then the contingent comparative issue.

Misrepresentation Issue Against Sunshine

4. Sunshine petitioned the Commission on March 6, 1981, to allocate FM Channel 292A, 106.3 MHz, to Cape Coral, Florida, and represented that it would "file an application for construction permit to operate on the FM channel if it is assigned to Cape Coral." LBC Ex. 4, pp. 1-2. The petition contained a preclusion study which failed to consider the effects of the assignment of Channel 292A on Fort Myers Villas. *Id.*, pp. 6-15. Nor

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The application of Skinner Broadcasting, Incorporated, was dismissed with prejudice on August 30, 1984. *Order*, FCC 84M-3757. Affirmative Broadcasting Company, Inc.'s application was also dismissed with prejudice on August 30, 1984. *Order*, FCC 84M-3756. This Initial Decision will treat only those issues that pertain to the applications of Sunshine and LBC.

[2] On March 29, 1984, a site availability issue was also added against Sunshine. *Memorandum Opinion and Order*, FCC 84M-1545. However, on April 27, 1984, Sunshine filed a petition for leave to amend specifying a new transmitter site, which petition was granted on June 11, 1984. *Memorandum Opinion and Order*, FCC 84M-2622. On June 13, 1984, Sunshine filed a motion for summary decision, which was granted on July 25, 1984, resolving the site availability issue in Sunshine's favor. *Order*, FCC 83M-3267.

was Fort Myers Villas ever mentioned in any of Sunshine's pleadings in the Channel 292A proceeding, BC Docket No. 81-565. LBC Exs. 4, 6, and 7.

5. As a result of Sunshine's petition, the Commission issued *Notice of Proposed Rulemaking* proposing the assignment of Channel 292A to Cape Coral. LBC Ex. 5. In its comments filed in that proceeding, Sunshine restated "its intention to apply for the channel if assigned and, if authorized, to construct a station promptly." LBC Ex. 6, p. 1. Sunshine urged that "in the absence of any expression [of interest for the channel at another community], there should be no further hesitation in proceeding with the assignment at Cape Coral." *Id.*, p. 2. Sunshine also urged that "the use of Channel 292A at Cape Coral is an efficient use of the frequency. Therefore, the Commission should make the assignment as proposed." *Id.*, pp. 2-3. Sunshine further told the Commission that "It must be noted that Cape Coral is extremely deserving of a second FM channel assignment and that there is no better alternative to meet that need than Channel 292A." Sunshine then noted that:

> A possible alternative, assigning Channel 393A to some smaller community in the area, makes no sense from a Section 307(b) or economic point of view . . . In other words, the assignment of Channel 292A to Marco [sic][3] is the most efficient and meaningful available use of the channel.

Concluding, Sunshine states: "In sum, Sunshine believes that the proposed assignment of Channel 292A is fully justified because Cape Coral is [sic] growing rapidly and needs additional broadcast service." *Id.*, pp. 4-6.

6. In its reply comments, Sunshine noted that "Channel 292A is the only channel of any class available for assignment to Cape Coral, which is a rapidly growing community with only one local radio service . . ." Sunshine urged that "the public interest, convenience and necessity dictates that Channel 292A be assigned to Cape Coral." LBC Ex. 7, p. 5. Sunshine also represented that Channel 292A "is indeed the last opportunity for a second aural service at Cape Coral . . ." *Id.*, fn. 3.

7. The Commission, by the then Acting Chief, Policy and Rules Division, Broadcast Bureau, acted to amend Section 73.202(b) of the Rules and assign Channel 292A to Cape Coral, effective March 5, 1982. LBC Ex. 10, p.3. In that *Report and Order*, released on January 20, 1982, it was noted that Channel 292A could be used in either Sanibel or Fort Myers Villas, whichever did not obtain Channel 285A (in another BC Docket, 82-63, then pending) by utilizing Section 73.203(b) of the Rules, the "10-mile" rule. LBC Ex. 10, p. 2.

8. Sunshine did file an application with the Commission seeking a construction permit for Channel 292A at Cape Coral, Florida, on February 24, 1982. LBC Ex. 11. However, on August 25, 1982, which was the last

[3] In its reply comments, at fn. 1, Sunshine corrected this and stated "Marco was inadvertently substituted for Cape Coral in that sentence."

day for filing an application, Sunshine amended its application to specify Fort Myers Villas as its community of license. LBC Ex. 11.

9. At the same time Sunshine filed its Petition for Rule Making in BC Docket No. 81-565, Mr. Bellairs believed that Cape Coral would be the best community to specify for the allotment because of the size of Cape Coral's population and the fact that Cape Coral had only one local transmission service. Sunshine Ex. 4. Mr. Bellairs did not then consider Fort Myers Villas because the reference point for Fort Myers Villas was outside of the "open" geographical area where a transmitter site for a station operating on Channel 292A could be located in compliance with the Commission's mileage separation requirements. Tr. 204, 205. At the time that comments were due in BC Docket No. 81-565, Mr. Bellairs believed, based upon his evaluation of the Commission's FM allotment policies, that the channel at issue in BC Docket 82-63 would be allotted to Fort Myers Villas. Tr. 254. He believed that if Cape Coral and Fort Myers Villas each had one allotment, Cape Coral would be preferred for Channel 292A as a second allotment based on its larger population. Sunshine Ex. 4.

10. However, on August 9, 1982, the Commission released a *Report and Order* in BC Docket 82-63 which allotted Channel 285A to Sanibel rather than Fort Myers Villas.[4] In that *Report and Order*, the Commission noted that any party interested in operating a station in Fort Myers Villas could apply to use Channel 292A in that community under the "ten-mile rule" then in effect.[5]

11. Upon learning of the allotment of Channel 285A to Sanibel (Tr. 220), and noting that other parties had already filed applications for construction permits for Channel 292A proposing Cape Coral as their community of service, Mr. Bellairs hoped an application to use Channel 292A at Fort Myers Villas would be preferred over an application to use that channel at Cape Coral because Fort Myers Villas did not have any local transmission service. Sunshine amended its application to specify Fort Myers Villas as its proposed community of license. Sunshine Ex. 4.

Section 307(b) Issue

12. LBC and Sunshine have stipulated that the areas and populations which would be served by their proposed facilities are substantially the same. No evidence was offered respecting existing service to the areas involved.

Cape Coral

13. Cape Coral is a 103-square-mile peninsula located at the mouth of the Caloosahatchee River in Lee County, Florida. It is Florida's second

[4] *Report and Order*, 47 Fed. Reg. 36170.

[5] *Id.* at 36171.

largest city in area and is one of two central cities of the Fort Myers-Cape Coral Metropolitan Statistical Area (MSA). LBC Ex. 1, 38.

14. Upon incorporation in 1970, Cape Coral's population was found by the 1970 U.S. Census to be 11,400. Cape Coral Ex. 1. In 1980, it was 32,103 and by 1982, the population had grown to 37,076. LBC Ex. 13, p. 2. The University of Florida's Bureau of Economic and Business Research found that Cape Coral's population had grown to 38,899 by 1984. Cape Coral Ex. 1.

15. Since 1970, Cape Coral gained more residents than any other municipality in the six-county southwest Florida area (counties of Charlotte, Collier, Glades, Henry, Lee and Sarasota). In January 1983, the City Planning Department estimated that in either 1983 or 1984 Cape Coral would become Lee County's most populous city. LBC Ex. 13, p.1.

16. The University of Florida's Bureau of Economic and Business Research has estimated that Cape Coral's population will grow by the year 2005 to 100,600. Cape Coral Ex. 1, p. 4. The City Planning Department has projected that, by 2005, the permanent population of Cape Coral will grow to somewhere between a low estimate of 100,600 and a high estimate of 159,400. LBC Ex. 13, p. 31. With the low estimate of 100,600, Cape Coral would have by 2005 19.48% of the total population of Lee County. It had in 1980 15.64% of the total population of Lee County. LBC Ex. 13, p. 23.

17. The Cape Coral Police Department has 80 employees, including 60 full-time officers. The Cape Coral Fire Department has 3 fire stations and 51 professional fire fighters. The city owns and operates water and sewage systems for municipal use. Cape Coral Ex. 1, p. 6. It has a 174-bed hospital and has received a "certificate of need" for an additional 80 beds; construction is nearing completion. There are 62 physicians and 27 dentists located in offices within Cape Coral. Cape Coral Ex. 1.

18. The school system for Cape Coral is administered by the Lee County School Board. LBC Ex. 15, pp. 4-5. Within the city are four elementary schools (1984 total enrollment - 2,825), two middle schools (1984 total enrollment - 2,032), and one high school (2,108 students). Cape Coral Ex. 1.

19. Cape Coral has set aside 317 acres for 43 park sites. Approximately 100 acres have been developed to date. The Cape Coral Yacht and Racquet Club is the community center for recreation. Located there are a swimming pool, tennis courts, racquetball courts, a 620-foot lighted fishing pier, a yacht basin with marina, and other facilities. The main building is used by many of the city's clubs and organizations which hold their meetings and social events there. *Id.*

20. There are approximately 128 active civic, fraternal, and social organizations in Cape Coral and 26 clubhouses. Cape Coral Ex. 1.

21. Cape Coral's economy and local employment are centered around small businesses and service oriented establishments which cater primarily to the needs of the retirement and seasonal populations. Cape Coral Ex. 1, p. 8. Since 1978, the city has experienced the development of four shopping centers (totalling a gross floor area of 383,033 square feet), 76,852 square feet of professional offices in buildings exceeding 20,000 square feet in size, a 150+-bed hotel and approval of two lighted industrial parks totalling 210 acres. Cape Coral Ex. 1, p. 9. Approximately 400 acres are currently zoned for industrial use in Cape Coral. The Cape Coral Industrial Park has more than 200 commercial and industrial enterprises. A new 80-acre Industrial Commercial Center is in northern Cape Coral. A third area along Pine Island Road is set aside for heavy industrial use. A fourth area, on Kismet Parkway, has been recently rezoned for industrial use. The Campus Industrial Park consists of 55 acres zoned for office park uses. Cape Coral Ex. 1.

22. Cape Coral has five commercial banks and eight savings and loan associations with at least one office in Cape Coral. Cape Coral Ex. 1, p. 10.

23. There is one radio station licensed to Cape Coral, WRCC(FM). Cape Coral Ex. 1 and Sunshine Ex. 5. There are published at Cape Coral a daily newspaper, the *Breeze*, and a weekly "advertiser," the *Lee County Shopper*. There is a cable television service available from American Cable Vision. Cape Coral. Ex. 1, p. 10.

Fort Myers Villas

24. Fort Myers Villas[6], unincorporated, is located in Lee County in southwest Florida, approximately halfway between Miami and Tampa. Sunshine Ex. 5, pp. 1, 22. The 1980 Census found the population of Fort Myers Villas to be 8,724 persons. *Id.*, p. 35.

25. Fort Myers Villas covers approximately four square miles of land, 2,600 acres, most of which is residential property containing a variety of multi-family and single family housing. The boundaries of the community of Fort Myers Villas coincide with the boundaries of the census designated place (CDP), Villas. *Id.*, p. 24.

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[6] From a comparison of the map submitted with Sunshine's August 25, 1982, amendment to show the location and boundaries of Sunshine's proposed community of license (Sunshine Ex. 6, p. 1-3) and the map of the Villas CDP (Sunshine Ex. 5, p. 29), it is clear that the boundaries of what Sunshine calls "Fort Myers Villas" coincide with the boundaries of the Villas CDP. The community of Fort Myers Villas was listed in the 1970 Census as an incorporated place identified as "Fort Myers Villas - Pine Manor." In the 1980 Census, the Census Bureau adopted a new term, "census designated place," for communities such as Fort Myers Villas, and the Census Bureau shortened the name of the community to "Villas." Under common usage, the community is referred to locally as either "Fort Myers Villas" or "Villas." Tr. 119, 139-140; LBC Ex. 16, p. 11. The name Fort Myers Villas was the name used by the Commission in BC Docket 82-63.

26. Development of Fort Myers Villas began in the 1940's, but significant growth did not take place until the 1960's. The first U.S. Census to recognize Fort Myers Villas as a place was the 1970 Census, which listed the population as 3,408 people. The population has more than doubled during the past 10 years. *Id.*, pp. 28, 35. Fort Myers Villas is governed by the Lee County Board of County Commissioners. *Id.*, p. 43.

27. Fort Myers Villas receives many of its governmental services from Lee County, including: police protection, sewage treatment, and bus transportation service. *Id.*, pp. 6, 7, 101. Water service and solid waste disposal are provided by private franchisees. Fire protection and rescue service are provided by the South Trail Fire District, an independent taxing authority governed by five elected fire commissioners, four of whom presently reside in Fort Myers Villas. *Id.*, p. 7.

28. The Lee County District School Board operates all public schools located in Lee County. Almost all of Fort Myers Villas falls within the school district for Villas Elementary School, which is located in Fort Myers Villas. *Id.*, p. 102. At the middle and high school levels, children from Fort Myers Villas attend either Cypress Lake schools or Fort Myers schools. *Id.*, p. 7. There are three private schools, two churches, and a synagogue located within Fort Myers Villas. *Id.*, pp. 6-8.

29. One of the civic and social organizations located in Fort Myers Villas is Fort Myers Villas Civic Association, devoted to improving the facilities and services available in the community. The association operates and maintains the Fort Myers Villas Civic Center, which serves as a meeting place for many of the clubs and organizations in the community. *Id.*, pp. 9, 104. There are various scout troops which meet in Fort Myers Villas whose membership is composed of children from Fort Myers Villas. In addition, Villas Elementary School has a Parent-Teacher Association which is active in the community. *Id.*, pp. 9-10. Finally, although their membership is not restricted to residents of Fort Myers Villas, there is a Moose Lodge, a Knights of Columbus hall, and a Vietnam Vets of Southwest Florida meeting hall located within Fort Myers Villas. *Id.*, pp. 10, 104.

30. There are six shopping centers and plazas located in Fort Myers Villas and more than 300 retail and service outlets. Two of the Fort Myers Villas shopping centers plan further expansion. *Id.*, pp. 11, 12, 105-113.

31. There are three industrial or manufacturing parks within the boundaries of Fort Myers Villas. The largest manufacturing concern is a manufacturer of pollution control equipment which employs approximately 180 people. *Id.*, pp. 12, 114. Fort Myers Villas has a 3.4% unemployment rate. *Id.*, pp. 14-15, 69-70.

32. Fort Myers Villas is comprised mainly of people of European ancestry, although there are small populations of Blacks, Filipinos, and

persons of Spanish origin living within the community. *Id.*, pp. 61-63. The median age of the population is 32.8 years. *Id.* The mean household income in 1979 was $18,902. *Id.*, pp. 64-89.

33. Fort Myers Villas is experiencing rapid expansion. The Lee County Planning Department projects growth of 264-433% for the planning district in which Fort Myers Villas is located for the period 1980 to 2005. Sunshine Ex. 10, pp. 1-4. The three largest housing projects now under construction will provide for a population increase of more than 3,000 people, an increase of 35% over the 1980 population. Sunshine Ex. 5, pp. 18-19, 117-118.

34. At the present time, there are no radio or television stations licensed to Fort Myers Villas, no outstanding construction permits for any broadcast stations, and no pending applications (other than Sunshine's). No FM or television channels are allotted to the community. Fort Myers Villas does not have a daily newspaper.

Standard Comparative Issue

LBC

35. LBC is a Florida business corporation formed July 14, 1982. Lewis Lippold is the only officer, director of stockholder of LBC. Mr. Lippold proposes to be the general manager of his station, performing those duties a minimum of 40 hours per week. He will have ultimate control over the station's programming, sales, news and public affairs and technical departments. LBC Ex. 2, p. 1.

36. Mr. Lippols joined KNUJ AM-FM radio, New Ulm, as a territory salesman in 1963 and worked 2 years in that position. LBC Ex. 2; TR. 485. He then joined KMRS(AM), Morris, Minnesota, as local sales manager from January to June 1966, and from July 1966 to June 1967 served as territory sales manager for KAUS/KAUS-FM, Austin, Minnesota. LBC Ex. 2. In 1975, Mr. Lippold formed Media-Pac, Inc., a time buying service and barter house to television stations in the United States, serving evangelists primarily. LBC Ex. 2; TR. 487.

37. Mr. Lippold has resided in the Fort Myers area since 1979 in a subdivision situated along the southeast bank of the Caloosahatchee River, directly across from Cape Coral. LBC Ex. 2, pp. 1-2.

38. Mr. Lippold is a 32nd degree Mason, a member of the Fort Myers Rod and Gun Club, a member of the Fort Myers Sportsman Club, a member of the Town and River Civic Association, and promoter of the 1984 Southwest Florida Travel Industry Trade Show. LBC Ex. 2, p. 3. All of these activities take place within the 60dBu contour of LBC's proposed station. *Id.*

39. Mr. Lippols has no ownership interest of any kind in any medium of mass communications except Media-Pac, Inc. LBC Ex. 2.

40. LBC proposes to install and operate auxiliary power generation equipment at both of its studio and transmitter sites to insure continued service to the public in the event of an emergency. LBC Ex. 3.

Sunshine

41. Sunshine is a Florida corporation whose sole shareholders are Jerald M. and Vivian M. Bellairs, who are husband and wife. Mr. Bellairs is the president, treasurer, and a director and owns 50% of the voting stock. Mrs. Bellairs is the vice-president, secretary, and a director, and owns 50% of the voting stock. Sunshine Ex. 1, p. 1.

42. Neither Sunshine as a corporation, nor Jerald M. Bellairs or Vivian Mr. Bellairs as individuals, have any equity or other ownership interest in, or official position with, any medium of mass communication. *Id.*

43. Mr. Bellairs will work at least 40 hours per week as the station's general manager, and Mrs. Bellairs will work at least 40 hours per week as the station's operations manager. *Id.*

44. As general manager, Mr. Bellairs will be responsible for all major aspects of the station's operation, including management of the station and its resources, programming decisions, hiring and firing employees, and community relations. Sunshine Ex. 2, pp. 1-2.

45. As operations manager, Mrs. Bellairs will be responsible for the operation of the station's programming, news, and office departments. Sunshine Ex. 3, pp. 1-2; Tr. 95, 96, 102 and 103.

46. Jerald M. Bellairs is a white male, and Vivian M. Bellairs is a white female. They both are citizens of the United States. They have both resided in Cape Coral, Florida (which is within the principal city coverage contour of Sunshine's proposed station), for the past 3 years, and they both will continue to reside within the principal city coverage contour of Sunshine's proposed station if Sunshine's application is granted. Sunshine Ex. 2 and 3.

47. Jerald M. Bellairs was the full-time general manager for Stations WIVS(AM), Crystal Lake and WXRD(FM), Woodstock, Illinois, from 1976 to 1981. During this period of time, he was also the executive vice president, a director, and a 20.6% stockholder of the licensee of these stations. As general manager of WIVS and WXRD, he supervised all aspects of the stations' operations, including programming, personnel and sales. Sunshine Ex. 2.

48. Vivian M. Bellairs was employed by WIVS and WXRD from the Fall of 1979 until mid-1981. She began working at WIVS/WXRD as a secretary and receptionist; by early 1980, she was supervising office and clerical personnel and collection of past due accounts. In addition, Mrs. Bellairs assisted her husband in the overall management of the stations. Sunshine Ex. 3.

49. Sunshine will install an emergency power generator system in order to insure that its station will able to remain on the air in the event of a public utility failure. Sunshine Ex. 1, p. 2.

Conclusions

Misrepresentation Issue Against Sunshine

50. In a rulemaking proceeding instituted by it, Sunshine urged that Cape Coral be allocated Channel 292A by emphasizing Cape Coral's need, negating the serious need of any other southwest Florida community, and promising to apply for the Channel if it was allocated to Cape Coral. When circumstances[7] indicated to Sunshine that it could improve its chances to be the successful competitor, it switched, before designation, its proposed community of license to Fort Myers Villas. LBC urges that Sunshine misrepresented its intent to build at Cape Coral.

51. Petitions for the allocation of a channel must promise to apply for the channel if it is allocated as asked. This requirement forestalls the possibility that after a channel is allocated to a community pursuant to rulemaking petition, the channel is permitted to lie dormant. If several applicants apply for the newly allocated channel, the reason for the requirement has dissipated and reneging by the original petitioner has little public interest effect on the efficient use of the spectrum. The question then becomes one of whether the reneging applicant should be estopped from denying the superior need of the city of allocation or whether a misrepresentation took place which affects the basic or comparative qualifications of that applicant.

52. As support for an estoppel theory, LBC cites *Beaufort County Broadcasting Co.*, 94 FCC 2d 572 (Rev. Bd. 1983). *Beaufort* was concerned with an applicant which throughout the hearing process urged the Section 307(b) superiority of one community and then, following oral argument to the Board, sought to amend to the community that it had argued was less favored. The Review Board held that the requisite good cause for a late amendment had not been shown and that the inconsistent argument for the newly proposed community amounted to playing games with the process from which the applicant was estopped. Here the amendment occurred before designation and when no good cause showing was necessary. The case is inapposite.

53. The Sunshine about-face does offend sensibilities in that it lays bare a certain cynicism extant in our process. The Commission is bound to consider the public interest; as a result, a competing applicant finds it easy to discover a public interest coinciding with whatever it wants to do. When it finds that self-interest indicates the desirability of a change in course,

[7] Competition for Cape Coral and the allocation of Channel 285A to Sanibel and not Fort Myers Villas.

that public interest, formerly glibly expressed, is left to wither. But, in cases such as this, there is another aspect of the public interest at work - the Section 307(b) mandate that licenses be issued to communities in which the need is greatest. If Sunshine had not amended to name Fort Myers Villas, that community would not have had the opportunity for comparison with Cape Coral as a competitor for a license and, if the comparison shows Fort Myers Villas as the most worth community (in 307(b) terms), an estoppel against so claiming would defeat that public interest.[8] The upshot is that the rule of estoppel will not be invoked, nor will, on the facts here, Sunshine be found guilty of a disqualifying misrepresentation.

54. Except for conclusory statements about the Section 307(b) superiority of Cape Coral over other communities, there is no proof of a deliberate falsehood on the part of Sunshine. Even LBC must rely on extreme circumstances to bolster its claim of deliberate falsehood: the demeanor of Mr. Bellairs, his failure to build on another channel which he applied for (and which his sister built), and some strained examination of questions and answers on cross-examination. All are straw grasping. Sunshine is not disqualified.

55. The Section 307(b) considerations favor Fort Myers Villas: Cape Coral is more populous by four times and has a municipal government while Fort Myers Villas has none. If the competition were for a first service for each community, there would be no question of Cape Coral's superiority. But, the critical facts are that Cape Coral has an aural transmission service and Fort Myers Villas has none (nor video nor print). See *Kaldor Communications, Inc.*, 56 RR 2d 137 (Rev. Bd. 1984); *Public Service Broadcasting of West Jordan, Inc.*, 55 RR 2d 1632 (Rev. Bd. 1984).[9]

56. The Section 307(b) issues being dispositive, the comparative qualifications of the parties (including any comparative effect of the misrepresentation issue on Sunshine) need not be considered.

Accordingly, IT IS ORDERED that the application of LBC IS DENIED and the application of Sunshine IS GRANTED.[10]

FEDERAL COMMUNICATIONS COMMISSION

FREDERIC J. COUFAL, *Administrative Law Judge*

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[8] If there were no other Cape Coral applicant, the consideration would be different.

[9] LBC continues to urge that Fort Myers Villas is not a community. It may be right, but that question is not at issue here. See *Order* (FCC 84M-1546) denying a community issue, because the designation order dealt with the problem and concluded the issue unfavorably to LBC.

[10] Unless one of the parties takes an appeal from this Initial Decision by filing exceptions within 30 days after the date on which the full text hereof is publicly released and unless the Commission reviews this case on its own motion, the Initial Decision will become effective 50 days after its public release pursuant to Section 12.67(d) of the Rules.